

(27,454)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 699.

DAHNIKE-WALKER MILLING COMPANY, PLAINTIFF IN
ERROR,

vs.

C. T. BONDURANT.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF
KENTUCKY.

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1 COMMONWEALTH OF KENTUCKY:

Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the 17th Day of October, 1919.

DAHNIKE-WALKER MILLING COMPANY, Appellant,

VS.

C. T. BONDURANT, Appellee.

Appeal from the Fulton Circuit Court.

Be it remembered that heretofore, to-wit: on the 24th day of August, 1914, the appellant by its attorney filed in the office of the Clerk of the Court of Appeals, a transcript of the record, which is in words and figures, to-wit:

2 THE COMMONWEALTH OF KENTUCKY:

Fulton Circuit Court, January Term, 1918.

Before His Honor Hon. Bunk Gardner, Judge of the Fulton Circuit Court.

Be it remembered that heretofore, to-wit, on the 1st day of September, 1915, Dahnke-Walker Milling Company by its Attorneys, Robbins & Robbins, appeared in the Office of Clerk of the Fulton Circuit Court and filed its petition against C. T. Bondurant, which petition is in words and figures following, viz:

Fulton Circuit Court.

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

VS.

CHESTER T. BONDURANT, Defendant.

Petition.

The plaintiff, Dahnke-Walker Milling Company, states that it is a corporation, duly created and organized under the laws of the State of Tennessee, and as such is empowered to contract and
3 be contracted with, to plead and be impleaded, in any — of law or equity and to buy and sell and do a general milling business. The plaintiff says that on or about the 27th day of June, 1915, it entered into a contract with the defendant, C. T. Bondurant, under and by the terms of which it purchased from him all the wheat grown on his land in the year 1915, supposed to be fourteen

thousand bushels, which wheat was to be delivered to the plaintiff's agent at Hickman, Kentucky, and weighed by its agent there and placed on board of cars of the Nashville, Chattanooga & St. Louis Railroad Company, by the defendant as soon as said wheat could reasonably be threshed, and it says that said wheat should have been threshed with the exercise of reasonable diligence not later than August 10, 1915, and by the terms of said contract the plaintiffs promised to pay the defendant \$1.04 per bushel when said wheat should be delivered to it as aforesaid. The plaintiff further says that at the time said wheat should have been delivered it was then reasonably worth \$1.20 per bushel, and the defendant failed and refused to deliver said wheat under said contract, although urged and demanded to do so by the plaintiff, and by reason of such failure this plaintiff has been injured and has sustained damage to the extent of the difference in what it agreed to give for said wheat and its value at the time it should have been delivered, amounting in all to the sum of \$2,240.00.

4 The plaintiff further says that under and by virtue of said contract it furnished to the defendant 2,200 sacks, to be used by him in hauling his said wheat to the cars and making delivery thereof to the plaintiff, which sacks he agreed to return with a reasonable time in good condition, and this plaintiff also advanced to the said defendant the sum of \$500.00 in cash. It says the defendant delivered to it one carload of low grade wheat, the grade of which was made low by reason of its being affected with wild onions and light in weight, and the plaintiff agreed to take said low grade wheat at the price agreed in the contract provided it got all of the wheat which it had purchased from the defendant, which was of a fine grade and good quality, grown on his land in the Mississippi River bottom behind the government levee. Plaintiff says that this car contained 432 bushels and 25 pounds, which at the contract price, amounted to \$449.28, which amount lacks \$50.72 of paying back the \$500.00 which the plaintiff advanced to the defendant. The plaintiff further says that said sacks so furnished and delivered to the defendant were worth ten cents each, and the defendant failed to return thirty-eight sacks, which were reasonably worth \$3.80. He returned good sacks in the number of 1,901 and he returned 261 sacks which were delivered to him in good condition and which were returned in a torn and injured condition and which had been exposed to the elements and injured and damaged at least five cents per sack, amounting to \$13.05, and the defendant has failed and refused to pay to the plaintiff either of said amounts, although frequently demanded of him.

5 Wherefore, plaintiff prays judgment against the defendant for the sum of \$2,307.57, and for its costs, and it prays for all necessary and proper relief.

ROBBINS & ROBBINS &
MOORE & McNEIL,

Attorneys.

(The above petition is endorsed as follows:)

Petition filed, Summon- and copy issued, September 1, 1915. J. W. Morris, Clerk, by Effie Bruer, D. C.

(Order Made on 1st Day of September Term, 20th Day of September, 1915.)

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

VS.

C. T. BONDURANT, Defendant.

Ordinary.

This case is ordered set forward for trial, Thursday the 16th day of the present term.

(Order Made on the 2nd Day of the September Term, 1915, 21st Day of September, 1915.)

DAHNIKE-WALKER MILLING COMPANY

VS.

C. T. BONDURANT.

Ord.

SAME

VS.

SAME.

Ord.

Came the Attorney for defendant and entered motion and moved the Court to require plaintiff in each of the two above cases to execute cost bonds and the Court being advised sustained
6 said motion and plaintiff is required to execute same under penalty of his petitions being dismissed upon his failure to do so.

(Order Made on the 3rd Day of the September Term, 1915, 22nd Day of September, 1915.)

DAHNKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Ordinary.

Came defendant by Attorney and filed his answer to Plaintiff's petition.

(Said Answer is as follows:)

Answer.

Fulton Circuit Court.

DAHNKE-WALKER MILLING CO., Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Answer.

The defendant, C. T. Bondurant, for his answer herein denies that the plaintiff, Dahnke-Walker Milling Co., a corporation created under the laws of the state of Tennessee is authorized by law to sue, herein, in this Court, or in any other Court of law or equity within the state of Kentucky.

Defendant denies that on or about the 27th day of June, 1915, or any other time, he entered into a contract with the plaintiff, under and by the terms of which plaintiff purchased from him all the wheat grown on his land, in the year 1915, supposed to be 14,000 bushels, or any part thereof, which was to be delivered to the plaintiff's agent at Hickman, Ky., and weighed by its agent at Hickman, Ky., and placed on board of cars of the N. C. & St. L. Railway, by the Defendant, as soon as said wheat could reasonably be threshed, and he denies that the plaintiff promised to pay to this defendant one dollar and four cents (\$1.04) per bushel when said wheat should be delivered to him. Defendant denies that on the 10th day of August 1915 that said wheat was reasonably worth one dollar and twenty cents per bushel or any sum in excess of \$1.04 per bushel f. o. b. cars Hickman, Ky., and he denies he had for sale wheat belonging to him exceeding four thousand bushels.

Defendant denies that the plaintiff furnished to him 2,200 sacks or any other number of sacks which he has failed to return. He states that he has returned all the sacks which he used while handling his wheat.

The defendant denies that any of the sacks so used by him were damaged or injured, that the damage and injury to said sacks by his

using of same amounted to the sum of \$13.05 or any part thereof; and he denies he is indebted to the plaintiff \$3.80 for failing to return 38 sacks, or any part thereof. He says all sacks were furnished to him by one John Creed, all of which were old sacks, and returned by him.

8 For further answer defendant states that he entered into a contract with one John Creed by which the said John Creed agreed and promised to pay to him cash for such wheat as he had to sell, the sum of \$1.04 per bushel, f. o. b. cars at Hickman, Ky., as soon as said wheat could be reasonably threshed and delivered. The number of bushels of said wheat being indefinite and unknown. Defendant denies that plaintiff advanced him at any time the sum of \$500 in cash, or any part thereof for the purpose of paying for any wheat. He states that on or about the 13th day of July, 1915, he sold and delivered to the said John Creed, one lot of wheat and that the said John Creed executed and delivered to this defendant a personal check, of said John Creed, for the sum of \$500, as payment of said lot of wheat, and the excess *if* any to be accounted for in the settlement for wheat to be thereafter delivered to the said John Creed.

Defendant states that afterwards when he got his said wheat crop threshed he offered to deliver said wheat to the said John Creed for the payment to him by the said John Creed of the sum of \$1.04 per bushel, whereupon the said John Creed agreed to pay to this defendant the price of said wheat in cash, and left defendant's office agreeing to return with said money, and never returned with the same, and plaintiff herein then secured an "order of delivery" and caused the sheriff to take possession of said wheat, upon executing order of delivery bond and defendant thereupon executed proper bond to retain possession of the same and tendered to the said John Creed \$50.29, the excess of the \$500 payment over the wheat delivered,

9 which tender was in good and lawful money of the United States, but which the said John Creed refused to accept, but defendant has been ready, able and willing ever since to pay the same to him which he has always refused.

Defendant says said John Creed was unable and could not pay for said wheat and did not at that time have the money in cash to pay for said wheat and did — have any money in bank, on which the said John Creed could draw his check in payment of the purchase price of said wheat, and failed and refused to pay him for said wheat, or return and offer him the money in payment therefor.

Defendant says that Dahnke-Walker Milling Co., did not either before or after obtaining said order of delivery or at any time, offer to pay him for said wheat and did not pay him for the same.

Defendant denies that he had any contract for the sale of said wheat with the Dahnke-Walker Milling Co., or that it had any right or claim to said wheat, by reason of any assignment of any contract with said John Creed to it.

For further answer defendant states that the said Dahnke-Walker Milling Co., a corporation created under the laws of the state of Tennessee in undertaking to obtain said wheat f. o. b. cars at Hickman, Ky., by reason of any transfer to it by said John Creed of his said contract or by otherwise attempting to purchase said wheat at

Hickman, Ky., and by reason of other acts of the plaintiff the Dahnke-Walker Milling Co., in buying and receiving wheat, grain and other farm produce in Fulton County in the state of Kentucky,

10 is engaged now and has been for some time past in doing business in the state of Kentucky, and that the said Dahnke-Walker Milling Co., has failed to comply with the laws of the state of Kentucky, permitting it to do business herein, and has failed to take steps to become authorized in the state of Kentucky to do business therein as provided by law, and has failed to appoint an agent in Kentucky, upon whom process against it might be served and defendant pleads and relies upon plaintiff's lack of authority to do business in Kentucky and its failure to appoint an agent in Kentucky for the service of process against it as a bar to this action.

Defendant denies that the plaintiff, Dahnke-Walker Milling Co., has been damaged by him in the sum of \$2,307.57, or any part thereof.

Wherefore defendant having answered prays to be dismissed with his costs and for all proper relief.

C. T. BONDURANT,

B. T. DAVIS,

W. J. WEBB,

Att'ys for Defendant.

Subscribed and sworn to before me by C. T. Bondurant, this September 22, 1915.

J. W. MORRIS,

Clerk,

By EFFIE BRUER, D. C.

(The foregoing answer is endorsed as follows:)

Filed September 22, 1915. J. W. Morris, Clerk, by Effie Bruer, D. C.

11 (*Order Made on the 9th Day of September Term, 1915, 29th Day of September, 1915.*)

DAHNIKE-WALKER MILLING Co., Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Ordinary.

Came the attorney for plaintiff and filed its demurrer to defendant's answer, and without waiving the rights of same filed its reply.

(Said demurrer is as follows:)

Demurrer.

Fulton Circuit Court.

DAHNKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

General Demurrer.

The plaintiff demurs to the second and third paragraphs of the defendant's answer, because neither paragraph, nor both taken together, states facts sufficient in law to constitute a ground of defense against the cause of action set up in the petition.

ROBBINS & ROBBINS,
F. S. MOORE,

Attorneys.

The above demurred is endorsed as follows:

Filed September 29, 1915. J. W. Morris, Clerk, by Ellie Bruer, D. C.

(The said Reply is as follows:)

Reply.

Fulton Circuit Court.

DAHNKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Reply.

12 The plaintiff for reply to the answer herein, denies that John Creed entered into a contract with the defendant, by which the said John Creed agreed or promised to pay defendant cash for such wheat as he had to sell for the sum of \$1.04 per bushel, or that John Creed entered individually into any contract with the defendant. The plaintiff denies that the defendant sold or delivered to the said John Creed any wheat of that John Creed advanced to him any money except as the agent of the plaintiff. The plaintiff denies that the defendant ever offered to deliver said wheat to the said John Creed or that the said John Creed agreed to pay the defendant the price of said wheat in cash himself, or otherwise than as the agent of this plaintiff, or that he ever failed to return the price of said wheat or that he ever agreed to pay for same, for, it says, the defendant never put but a small portion of said wheat in cars and

refused to permit the plaintiff to weigh said wheat or guarantee the weights which the defendant claimed he had made were correct. Plaintiff says that it did get out an order for delivery for a small portion of said wheat, to-wit: — cars, but, it says that the action in which said order of delivery was issued has been dismissed without prejudice, and it denies that the defendant tendered to said John Creed \$50.29, the excess of the \$500.00 advanced on wheat by plaintiff, or that he made such tender in good or lawful money of the United States, and it denies that the defendant has been willing or able to pay same since that time. The Plaintiff denies that said John Creed was unable or could not pay for said wheat or did not have any money in bank on which he could draw his check for payment of the purchase price of said wheat, or that he failed or refused to pay for said wheat or to offer the defendant money in payment therefor. The plaintiff says that it was at all times ready, willing and able to pay for said wheat whenever the defendant would deliver same to it, but that defendant refused to deliver the wheat.

For reply to the third paragraph of the answer, plaintiff denies that it has ever been doing business in the state of Kentucky within the meaning of the laws of Kentucky or of the United States, by buying defendant's wheat or by buying other grain or farm produce in Fulton County, Kentucky. It denies that it has ever failed to comply with any law of the state of Kentucky, by which it would have a right to do business in Kentucky, or that it has failed to take any steps required by the state of Kentucky to do business therein provided by law.

The plaintiff further says that it is a foreign corporation and its home office and place of business is Union City, in the state of Tennessee, and that it is a manufacturer of flour and other food stuffs, and is engaged in Interstate Commerce in shipping flour and other food stuffs from Union City in the state of Tennessee to various places on other states, and, as such manufacturer of flour and other food stuffs it is engaged in buying wheat in the state of Kentucky and in other states and shipping same out of Kentucky into the state of Tennessee to its mill at Union City in said state. The plaintiff says

that while it was so engaged in this business at Union City, Tennessee, its agent, John Creed, entered into the contract of Purchase with the defendant by which the defendant sold all the wheat grown on his lands in the year 1915 and he agreed to haul said wheat from his farms and place same in the cars of the Nashville, Chattanooga & St. Louis Railroad Company at Hickman, Kentucky, and this railroad company was a common carrier engaged in Interstate Commerce, and it was the intention of both plaintiff and defendant, and the wheat was sold for such purpose, that said wheat would be transported by the N. C. & St. L. Railroad Company from Hickman, in the State of Kentucky, to Union City, in the state of Tennessee. It says that if this wheat had been delivered to it at Hickman on board of said cars it would have immediately been transported from Hickman, Kentucky, to Union City, Tennessee, and therefore, it says it was engaged at said time in Interstate Commerce and was doing no other business in Kentucky except the purchasing

of wheat and other grains and transporting same to its mill in Union City, Tennessee, and it says that under the laws of the United States and the Constitution thereof, it was engaged in Interstate Commerce and is protected by the laws of the United States and the Constitution thereof from any interference whatever on the part of the state of Kentucky, and the statute of law which the defendant attempts to invoke in this case, so far as this plaintiff is concerned is unconstitutional and void, for, it says that the Supreme Court — State of Kentucky and the Supreme Court of the United States have both held that the statute which the defendant invokes in this case has no application to one engaged in Interstate Commerce, and it says that it was so engaged in Interstate Commerce at said time.

Wherefore, having fully replied, the plaintiff prays as in its petition, and for all necessary and proper relief.

F. S. MOORE &
ROBBINS & ROBBINS,
Attorneys.

(The above Reply is endorsed as follows:)

Filed September 29, 1915. J. W. Morris, Clerk, by Effie Bruer, D. C.

(Order Made on the 16th Day of September, 1915, 7th Day of October, 1915.)

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Ordinary.

This case is ordered continued until the next term of Court.

(Order Made on the 1st Day of January Term, 1916, 17th Day of January, 1916.)

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Ordinary.

Ordered that the above case be set down for trial Thursday, February 3rd, 1916.

(Order Made on the 3rd Day of the January Term, 1916, 19th Day of January, 1916.)

16 DAHNKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Ordinary.

The Demurrer heretofore filed to the third paragraph of defendant's answer heretofore filed came on this day for trial and the Court being advised overruled said demurrer to which action of the Court the plaintiff excepted.

This day came the defendant and filed General Demurrer to the reply of the plaintiff, filed herein, as a whole and to each part and paragraph thereof and the Court being advised overruled said demurrer to which action of the Court the defendant excepted.

(The said General Demurrer is as follows:)

Gen. Demurrer.

Fulton Circuit Court.

DAHNKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

General Demurrer.

Now comes defendant and demurs to the plaintiff's reply filed herein as a whole and each part and paragraph thereof because it does not state an avoidance of the defense set out in the answer herein.

C. T. BONDURANT,
By W. J. WEBB &
B. T. DAVIS,

Attorneys.

(The above General Demurrer is endorsed as follows:)

Filed January 19, 1916. W. L. Hampton, Clerk.

(Order Made on the 14th Day of January Term, 1916, 1st Day of February, 1916.)

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

VS.

C. T. BONDURANT, Defendant.

Ordinary.

Ordered that the above named case be continued.

(Order Made on the 1st Day of Special April Term, 1916, 24th Day of April, 1916.)

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

VS.

C. T. BONDURANT, Defendant.

Ordinary.

Came defendant by attorney and filed his rejoinder to plaintiff's reply.

By agreement the material affirmative allegations in defendant's rejoinder are controverted of record.

Then came defendant by attorney and entered motion for a continuance herein and in support of said motion filed his affidavit setting up the testimony of absent witnesses, but the Court being advised, overruled said motion for continuance and plaintiff is not required to admit said affidavit, to which defendant excepted.

Then came the parties and announced ready for trial, the issues being joined, came the following Jury, viz: Holcombe Jewery, Z. P. Sigman, C. M. Reynolds, J. H. Wade, R. A. Howell, A. Stoker, Morgan Davidson, T. J. Gordan, W. A. Luten, J. R. Ott, B. G. Hale, Jr., John Harrison, twelve in number from the regular panel, who were legally tested accepted and duly sworn.

Upon motion of plaintiff, the official stenographer is directed to take notes of the evidence herein.

At the conclusion of plaintiff's evidence the defendant asked the Court to give to the Jury Instruction "A" but the Court refused to give said instruction, to which defendant excepted.

The evidence being in part heard, at the hour of evening adjournment, the Jury were permitted to disperse until 9 o'clock tomorrow morning under strict admonition from the Court.

(Said Rejoinder to Plaintiff's reply is as follows:)

Rejoinder.

Fulton Circuit Court.

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Rejoinder.

1st. The defendant, C. T. Bondurant, for rejoinder to the
19 reply of the plaintiff herein, states that John Creed, agent, of
the plaintiff, is now a resident of Fulton County, and has been
conducting and transacting business herein for several years, and has
been making contracts for the sale to him of wheat, corn hay grain
and produce, and that said contracts were never made in Tennessee,
and were never paid for at any place except Hickman, Ky., and that
delivery of same has never been required at any point except at Hick-
man, in Fulton County, Ky., and that said transactions have always
been made, delivered, paid for and fully completed entirely within
Fulton County, Ky., that the plaintiff has never complied with the
laws of Kentucky, authorizing it to do business therein, and defend-
ant pleads and relies upon the laws of Kentucky and plaintiff's failure
to comply therewith, as a bar to this action.

2nd. Defendant denies that in his contract for the sale of his
wheat, made with John Creed, as set out in his answer, it was agreed
or was a part of said contract, that said wheat was to be transported
by the Nashville, Chattanooga and St. Louis Railway, from Hick-
man, Ky., and delivered to the plaintiff, Dahnke-Walker Milling
Company, at Union City, Tenn., or elsewhere, and the defendant
denies that he was to deliver said wheat at any point or place, other
than Hickman, Ky., and was not in any way to be respon-
20 sible for same, in the transportation of said wheat, from Hick-
man, Ky., to any other point.

2nd. Defendant, C. T. Bondurant states that the said John Creed
has been engaged in business in Hickman, Fulton County, Ky., buy-
ing grain, hay and farm produce for many years, apparently in his
own name. Defendant states that said contracts for the purchase of
said hay, grain and produce, were always made in Fulton County,
Ky., and were always paid for in Fulton County, Ky., and delivery
of same was always made in Fulton County, Ky. Defendant states
that if in truth and in fact the said Jno. Creed during this time and
transaction, acting as the agent of the plaintiff, Dahnke-Walker Mill-
ing Co., then the defendant states that the plaintiff, Dahnke-Walker
Milling Co., has violated the laws of the state of Kentucky, by failing
to comply with the laws therewith, and by failing to designate an
agent in the state of Kentucky as provided by law for the service of
process against it, and defendant pleads and relies on the laws of the

State of Ky., and these acts of plaintiff as a bar to this action. Wherefore defendant prays as in its answer and for all proper relief.

B. T. DAVIS &
W. J. WEBB,

Att'ys.

(The above rejoinder is endorsed as follows:)

Filed April 24, 1916. W. L. Hampton, Clerk, by Effie Bruer, D. C.

1 (Orders Made on the 2nd Day of Special April Term, 1916,
25th Day of April, 1916.)

DAHNKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Ordinary.

Came defendant by Attorney and tendered into Court \$50.29 in full settlement, of the difference between plaintiff and defendant but the plaintiff refused to accept said amount.

The Jury resumed seats and at the conclusion of the evidence the hour of noon adjournment having arrived, the Jury were permitted to disperse until 1.30 o'clock under strict admonition from the Court.

The Jury resumed their seats at 1.30 and then the plaintiff offered and asked the court to give to the Jury Instructions B, C, D, E, & H. But the court being advised refused said Instructions to which plaintiff excepted.

Then the court gave to the Jury Instructions No. 1, Y, F, M, and G to which both parties excepted.

At the conclusion of the argument of counsel, the case was submitted to the Jury, who retired to their room for deliberation and afterward returned into court the following Verdict, viz:

"We the Jury, find for the plaintiff, The Dahnke-Walker Milling Co., in the sum of \$960.00 covering the difference in price of wheat and damage and loss to sacks.

W. A. LUTEN,
Foreman.

Judgment.

Wherefore it is adjudged by the Court that the plaintiff Dahnke-Walker Milling Company recover of the defendant C. T. Bondurant, the sum of Nine hundred sixty (960.00) Dollars with interest from this date and its cost herein expended for which execution may issue.

*(Order Made on the 3rd Day of the Special April Term, 1916,
26th Day of April, 1916.)*

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

VS.

C. T. BONDURANT, Defendant.

Ordinary.

The Court being advised, the order made herein on yesterday on page 507 is now ordered set aside and held for naught in so far as the order refers to the giving, offering and refusing of instructions and the following order is substituted therefor as correct, viz:

At the conclusion of all the evidence, the defendant again offered Instructions "A" which the Court again refused to give, to which the defendant excepted.

Then the plaintiff, by attorney *and* offered and asked the Court to give to the Jury Instructions B, C, D, E, F, G, and H, to which defendant objected and the Court being advised sustained said objections as to B, C, D, E, and H and refused said instructions, to which plaintiff excepted, and the court overruled said objections as to F and G, and gave said instructions, to which defendant excepted.

23 Then came defendant and asked the Court to give to the Jury Instructions M and Y, to which plaintiff objected, but the Court being advised, overruled said objections and gave said instructions, to which plaintiff excepted.

*(Order Made on the 3rd Day of the Special April Term, 1916,
26th Day of April, 1918.)*

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

VS.

C. T. BONDURANT, Defendant.

Ordinary.

The defendant, C. T. Bondurant having paid into Court \$50.29 the amount admitted by defendant as due plaintiff as over payment for first delivery of wheat, now same is ordered paid to plaintiff and it is further adjudged as to this sum, the defendant having proven a legal tender of the money before suit filed by plaintiff. That the plaintiff is not entitled to any cost arising upon this claim.

(Order Made on the 4th Day of the Special April Term, 1916,
27th Day of April, 1916.)

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Ordinary.

Came defendant by Attorney and filed Motion and reasons for a new trial herein.

24 (Order Made on the 5th Day of Special April Term, 1916,
28th Day of April, 1916.)

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Ordinary.

Defendant's motion for a new trial already filed herein, coming on for trial and the Court being advised overruled said motion, to which the defendant objected and excepted at the time and still objects and excepts and prays an Appeal to the Court of Appeals, which is granted and defendant is given to and including the 12th day of the next May term of Court to prepare and file his bill of exceptions herein.

It is agreed between the parties in this case that the regular Judge of this Court may sign and approve the bills of exceptions and all future orders made in this case.

25 (Order Made on the 4th Day of May Term, 1916, 4th Day of
May, 1916.)

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Ordinary.

This day came the defendant, C. T. Bondurant and presented Bill of Exceptions No. One, duly signed, in duplicate by Hon. Bonk Gardner, Circuit Judge, and also Bill of Exceptions No. Two, duly signed by said Judge, and on defendant's motion said Bill of Exceptions were duly filed in open Court and it is ordered that same be made a part of the record, and in making out transcript of record the Clerk

is directed to use one copy of the said Bill of Exceptions No. One, without copying same.

(Order Made on the 2nd Day of September Term, 1916, 19th Day of September, 1916.)

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Ordinary.

Ordered that the above case be continued.

26 *(Order Made on the 1st Day of January Term, 1917, 15th Day of January, 1917.)*

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Ordinary.

Ordered that the above case be continued.

(Order Made on the 17th Day of the September Term, 1917, 5th Day of October, 1917.)

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Ordinary.

Came C. T. Bondurant by Attorney and filed Mandate from Court of Appeals. Same is ordered to record and is as follows, viz:

Mandate.

The Court of Appeals, 5/25, 1917.

C. T. BONDURANT, Appellant.

Against

DAHNIKE-WALKER MILLING Co.

Appeal from a Judgment, Fulton Circuit Court.

The Court being sufficiently advised, it seems to them the Judgment herein is erroneous.

27 It is therefore considered that said Judgment be reversed and cause remanded for further proceedings not inconsistent with the opinion herein.

Which is ordered to be certified to said Court.

A copy.

Attest:

R. W. KEENON,

C. C. A.

By GUY L. VANSANT,
D. C.

Issued 9/21, 1917.

(Order Made on the 1st Day of the January Term, 1918, 21st Day of January, 1918.)

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Ordinary.

Ordered that the above case be continued.

(Order Made on the 3rd Day of May Term, 1918, 8th Day of May, 1918.)

Order & Judgment.

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Order and Judgment.

This day this cause coming on regularly for trial, both parties announced ready, thereupon came the Jury of their own selection to-wit: R. E. Stilly, J. W. Crawford, W. P. Felts, H. W. Campbell, W. B. McGehee, J. D. Davis, Pat Freeman, H. H. Coulter, H. L. Williams, Till Harrison, W. J. Willingham, and W. G. Anderson, who were tried and tested and duly sworn to well and truly try the issue and a true verdict render. After hearing all the witnesses introduced by the plaintiff, on motion of the defendant, the Court gave to the jury instructions No. "A."

(The above Instruction is as follows: "The Court instructs the Jury to find for the defendant.")

And thereupon the Jury returned into Court the following verdict:

"We the Jury find for the defendant.

W. B. McGEHEE,
One of the Jury."

Wherefore it is adjudged by the Court that the plaintiff's petition be dismissed absolutely, and that the defendant recover of the plaintiff his costs herein expended for which execution may issue.

Then came the plaintiff and filed reasons and entered motion and moved the Court to set aside the verdict herein, and to grant for plaintiff a new trial, and the Court being advised overruled said motion and refused to set aside the verdict, or to grant plaintiff a new trial, to all of which the plaintiff objects and excepts and pray to the Court of Appeals which is hereby granted and plaintiff is given until the tenth day of next September Term of the Court to file Bill of Exceptions.

(The said Reasons and Motion for new trial are as follows:)

29

Motion for New Trial.

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Reasons and Motion for New Trial.

Now comes the plaintiff and files reasons and moves the Court to set aside the verdict and to grant it a new trial.

First. Because the Court erred in giving to the Jury instructions "A," at the conclusion of the plaintiff's evidence, and

Second. Because the Court erred to adjudging that plaintiff was doing business in Kentucky in violation of section 571 of the Kentucky Statutes by buying and shipping wheat out of Kentucky into the state of Tennessee to its Mills, and was not engaged in Interstate Commerce in so doing.

ROBBINS & ROBBINS,
Attorneys for Plaintiff.

(The above reason and motion for new trial are endorsed as follows:)

Filed May 8th, 1918. W. L. Hampton, Clerk.

30 & 31 (Order Made on the 9th Day of the May Term, 1918, 15th Day of May, 1918.)

DAHNIKE-WALKER MILLING COMPANY, Plaintiff,

vs.

C. T. BONDURANT, Defendant.

Ordinary.

This day came plaintiff and filed Bill of Exceptions No. 1, duly signed by the Judge of the Court and same was made a part of the record.

(Said Bill of Exceptions is in words and figures as follows:)

Bill of Exceptions No. 1.

Fulton Circuit Court.

DANKE WALKER MILLING COMPANY, Plaintiff,

VS.

C. T. BONDURANT, Defendant.

Be it remembered that upon the trial of this case, the plaintiff Danke Walker Milling Co. first introduced on its behalf Mr. GEORGE DANKE, who after being duly sworn testified as follows, to wit:

Examined in chief by Hon. J. E. Robbins:

Q. Mr. Danke what is your business?

A. I am in the mill business.

Q. What official position do you hold with the plaintiff company Danke Walker Milling Co.?

A. President and General Manager.

Q. Where is your place of business?

A. Union City, Tennessee.

Q. In the months of June, July and August of last year, 1915, state whether or not you had an agent representing you at Hickman, Kentucky?

A. Yes sir.

Q. What agent was that, who?

A. Mr. John Creed.

Q. Now, Mr. Danke, when this contract was made with the defendant C. T. Bondurant, state whether or not you were present?

A. No sir, I was not.

Q. At that time, state how long you had been buying grain at Hickman?

A. About twelve years.

Q. You say you had been buying at Hickman for about twelve years?

A. Yes sir.

Q. Say whether or not prior to this time of the contract, you had ever bought any grain from the defendant?

A. Yes, we have been buying from him off and on for ten or twelve years.

Q. Now this wheat that is involved in this case, tell the jury where this wheat was to be shipped?

Objections by the defendant.

Sustained by the Court.

Exceptions by the plaintiff.

Avowal: The plaintiff's attorney announced to the court that if the witness were permitted to answer the question he would say that the wheat involved in this case was to be shipped from Hickman, Kentucky, to Union City, Tennessee, and to which ruling of the court the plaintiff excepts.

Q. The grain that you were buying through your agent at Hickman during the year of 1915, to what use was that to be put, what did you do with it?

Objections by the defendant.

Overruled by the court.

Exceptions by the defendant.

A. He milled it there at the mill at Union City.

Q. Now tell the jury what you mean by milling it?

A. He made it into flour, feed, etc., etc.

Q. Where would you get all of your raw materials?

34 A. In seven or eight different states.

Q. Say whether or not you were advised and knew what the price of wheat was in Hickman, Kentucky, and this vicinity from the 27th day of June until the 10th day of August?

Objections by the defendant.

Sustained by the court.

By the Court: The objections *is* sustained as to what the price of wheat was, the reasonable vendable value of wheat at that time would be the market, he could answer if he was acquainted with the reasonable vendable market value of what the market was at that time.

Exceptions by the plaintiff.

Q. What or how long have you been in the grain business?

A. About sixteen years.

Q. Were you acquainted with the market price in the months of July to August 15th?

Objections by the defendant.

Overruled by the court.

Exceptions by the defendant.

A. Yes sir.

Q. Were you acquainted with it in Hickman and vicinity?

Objections by the defendant.

Overruled by the court.

Exceptions by the defendant.

A. Yes sir.

Q. Tell the jury what wheat was worth up to the 10th day of August at Hickman?

35 Objections by the defendant.

Overruled by the court.

Exceptions by the defendant.

A. Well it opened up at a dollar about the 20th of June, and then the market went up to \$1.18.

Q. When was it at that price?

Objections by the defendant.

Overruled by the court.

Exceptions by the defendant.

A. From the 25th of July until the 10th of August.

Q. Now tell the jury how you know this?

A. By buying stuff every day.

Q. Was you paying those prices every day?

A. Objections by the defendant.

Overruled by the court.

Exceptions by the defendant.

A. I was.

Q. Say whether or not you were paying this price for wheat at this time in Hickman, Kentucky?

Objections by the defendant.

Sustained by the court.

Avowal: At this juncture the plaintiff by attorney announced to the court that if the witness were permitted to answer the question he would say that at this time he was paying \$1.18 for wheat in Hickman from the 25th of July until the 10th of August and to the ruling of the court in refusing to permit the witness to answer the questions, the plaintiff excepted at the time and still excepts.

Q. Now what was the vendable market value of wheat at that time if you know?

A. From a dollar eighteen up.

Q. Now tell the jury what you intended doing with that wheat you purchased from Mr. Bondurant the defendant?

Objections by the defendant.

Overruled by the court.

Exceptions by the defendant.

A. Was going to mill it.

Q. Who bought that wheat as your agent here?

A. Mr. Creed?

Q. John Creed?

A. Yes sir.

Q. For whom did he buy it?

A. For the firm of Danke Walker Milling Co.

Q. He was your agent?

A. Yes sir.

Q. How long had he been your agent?

A. About ten years.

Q. Did you ever have any transactions with the defendant Bondurant in dealing in corn and wheat prior to this time?

A. Yes, we have had a great many dealings with him.

Q. Say whether or not Mr. Bondurant knew that Mr. Creed was representing you as your agent at Hickman, Kentucky?

A. He did.

Q. Say whether or not the defendant Bondurant delivered to you any of this wheat?

37 A. Yes sir, he delivered some.

Q. How much?

A. Something over four hundred bushels?

- Q. Do you know exactly how much it came to?
A. Yes sir.
Q. How much?
A. Four hundred and thirty-two bushels and twenty-five pounds.
Q. Do you know how much that amounted to in dollars and cents?
A. Yes sir.
Q. Say how much?
A. I think four hundred and twenty-nine dollars and something.
Q. Well to be exact, I will ask you by way of refreshing your recollection if it wasn't exactly in dollars and cents \$429.48?
A. Yes sir.
Q. Did you advance him any money on wheat?
A. Yes sir.
Q. How much?
A. Five hundred dollars.
Q. Now the wheat the defendant delivered you lacked how much paying that \$500.00?
A. It lacked \$50.52 I think it was.
Q. Now do you know about these sacks?
A. Yes sir.
Q. Tell the jury how many sacks they failed to return, and what they were worth, and what damage was done to the sacks if any?

Objections by the defendant.
38 Overruled by the court.
Exceptions by the defendant.

- A. They failed to return, well I cannot tell exactly, but I think it was fifteen or twenty they failed to return.
Q. How many if any, did they expose to the weather?
A. About two hundred and sixty one sacks.
Q. What damage was done to them?
A. They were full of holes.
Q. How much were the sacks worth each?
A. Ten cents each.
Q. How much damage was done to them?
A. About half.
Q. Then they were damaged about five cents each or per sack?
A. Yes sir.
Q. How many sacks did you send him, the defendant?
A. Something like twenty two hundred I think.
Q. Have you any acknowledgement from Mr. Bondurant about the receipt of those sacks?
A. I have some letters here from Mr. Bondurant acknowledging the receipt of the sacks.

At this juncture the plaintiff desires to offer in evidence above referred to letters, and same are hereby offered and received as evidence in this case and read to the jury and are in words and figures as follows, to wit:

Objections by the defendant.
Overruled by the court.
Exceptions by the defendant.

A. Said letters are as follows, to wit:

39

"Hickman, Kentucky, 7/27/15.

Danke Walker Milling Co., Union City, Tenn.

GENTLEMEN:

Enclosed find herewith B/L for 156 bags, freight prepaid on shipment.

Kindly acknowledge receipt of same and oblige.

Yours truly,

C. T. BONDURANT,
Per W. E. BONDURANT.

Hickman, Ky., 7/27/15.

Danke Walker Milling Co., Union City, Tenn.

GENTLEMEN:

Enclosed find herewith B/L for 1,235 wheat sacks, or 12 bundles, 11 bundles containing 100 sacks each and one bundle containing 135 sacks, which makes a total of 1,235 sacks in all. I have prepaid the freight on these sacks.

Yours very truly,

C. T. BONDURANT,
Per W. E. BONDURANT.

Hickman, Kentucky, 8/10/15.

Danke Walker Milling Co., Union City, Tenn.

GENTLEMEN:

Enclosed herewith find B/L for eight bundles of sacks containing 771 sacks in all, freight prepaid.

C. T. BONDURANT,
Per W. E. BONDURANT."

40

Q. Now say whether or not those sacks were the sacks that you sent over here for the use of the defendant for this wheat to be shipped in?

A. Now the contract I made with Mr. Creed over the telephone about these sacks was that——

Objections by the defendant.
Sustained by the court.

Q. Say whether or not these were the sacks that you sent over here for this wheat you bought through Mr. Creed to be used in shipping this wheat, just answer that question Mr. Danke?

Objections by the defendant.
Overruled by the court.
Exceptions by the defendant.

By the Court: In view of these letters introduced as evidence, I will have to overrule the objection.

Exceptions by the defendant.

A. Yes sir.

Cross-examination by Hon. J. W. Webb:

Q. You are the plaintiff Mr. Danke?

A. Yes sir.

Q. Now these sacks, were they new sacks when they were delivered to Mr. Bondurant?

A. Yes sir, when we sent them to Mr. Creed they were.

Q. Do you say that you sent them to be delivered to Mr. Bondurant?

A. Yes sir, they were shipped to Mr. Creed to be delivered to Mr. Bondurant.

41 Q. Then they were not shipped for anybody else were they?

A. Well, we shipped some more sacks I think about twenty two hundred, and Mr. Creed reported having delivered them to Mr. Bondurant.

Q. When those sacks were delivered to Mr. Bondurant by Mr. Creed, do you know personally where they come from?

A. No I don't know personally, but those sacks were shipped here for him for that purpose?

Q. Now is it not a fact that those sacks were shipped here to be used by Mr. Ledford and Randle?

A. No sir, we did not buy any wheat from them, there was only two other people that we did buy from here.

Q. Do you know of your own knowledge whether or not any one else used these sacks besides Mr. Bondurant?

A. No sir, I don't know it personally.

Q. How many sacks did you send over here?

A. I think it was twenty five hundred.

Q. How many of that twenty five hundred was to be used by Mr. Bondurant?

A. Well, on the original contract, we was to furnish him two thousand sacks.

Q. How do you know that?

A. I have a letter to that effect.

Q. From whom?

A. Mr. Creed.

Q. Were you present when the contract was made?

A. Was I present?

A. Yes were you present?

42 A. No but he told me about it.

Q. Then you did not personally hear the contract between Mr. Creed and Mr. Bondurant did you?

A. No sir.

Q. All in the world you know about it then is just what Mr. Creed told you isn't it?

A. I talked to Mr. Creed about the contract over the phone about it.

Q. Well that's all you know about it, is what he told you over the phone isn't it?

A. Yes sir.

Q. You don't know whether, or where the contract was made do you, what place?

A. No sir.

Q. Now Mr. Dankes, didn't you send those sacks to Mr. Creed to be used by any customer here?

A. No sir, I sent two thousand of them to be used by Mr. Bondurant and I think Mr. Bondurant got twenty two hundred of them.

Q. Well the only thing you know is that he returned to you twenty two hundred sacks, and didn't you make the statement that he returned to you twenty two hundred and forty six sacks, wasn't that your statement?

A. No sir, I said twenty two hundred.

Q. How many sacks do you now say he did return?

A. The bills of lading will show.

Q. Didn't you say awhile ago that at one time he returned one hundred and fifty six, and one occasion one hundred and fifty five?

43 A. No sir, I didn't make that statement, the bills of lading will show exactly how many it was.

Q. Look at these bills of lading and tell how many, do-sn't this one here show 156?

A. I don't know.

Q. Well look and see if it don't.

Objections by the plaintiff to the manner of asking witness questions.

By the Court: Just proceed and don't argue with the witness.

By the attorney for defendant: "Judge I want him to answer my questions *respectively*."

Q. Now doesn't that B/L show 156 sacks, and do-sn't this one show 771 sacks?

A. That was not the matter that I introduced as evidence, you have the wrong matter there, the second lot there is what I introduced.

Q. Well here is another lot, now this one shows 1,235 isn't that correct?

A. Yes.

Q. Now you say there was 1,235 in that, and here is one for 771 and one for 156, now is that all he returned?

A. I told you Mr. Webb that the bills of lading would show exactly how many, I don't know exactly the number, but the bills of lading will show exactly.

Q. Now you say there was fifteen or twenty sacks that were not returned?

44 A. Yes sir.

Q. And that they were ten cents each and the sacks not returned amounted to about \$1.50 to \$2.00 not returned is that right?

A. Yes sir.

Q. How many sacks did you say were damaged?

A. I think about two hundred and sixty damaged.

Q. What did you say they were damaged, how much were they damaged?

A. About one half.

Q. What was wrong with them?

A. They were full of holes.

Q. Do you know their condition when delivered to Mr. Bondurant?

A. No sir.

Q. Do you know personally who else handled them before they got to Mr. Bondurant?

A. No sir.

Q. Now Mr. Dankes, about that check for the wheat, I here hand you the check which is the original check given Mr. Bondurant for for that car of wheat, isn't this the check?

A. Yes sir I think it is it.

Q. Now that wheat was delivered and in the car at the time was it not?

A. Well I could not tell you personally whether it was or not.

Q. Are you acquainted with the signature on that check?

A. Yes sir.

Q. Do you know who signed that, do you know whose signature that is?

45 A. Yes sir.

Q. Whose is it?

A. John Creed's.

Q. Are you willing to introduce this check Mr. Danke and let it be offered as evidence in this case?

A. Yes sir.

Q. The above check at this juncture is hereby introduced as evidence, also draft for same amount which is considered as evidence in this case and read to the jury and same is in words and figures as follows, to wit:

Hickman, Ky., July 13th, 1915.

Peoples Bank

Pay to the order of C. T. Bondurant \$500.00 five hundred dollars and 00/100 for advance on wheat crop.

(Signed)

J. S. CREED.

Also draft on Peoples Bank for same amount which is attached hereto and made a part of this evidence. Check is endorsed on the back C. T. Bondurant."

Redirect examination by Hon. J. E. Robbins:

Q. Now Mr. Dankes, who furnished the money to Mr. Creed to pay Mr. Bondurant for that wheat?

Objections by the defendant.

Overruled by the court.

Exceptions by the defendant.

A. We did, the firm of Danke-Walker Milling Co. did.

46 Q. What arrangements if any, with any bank here did you have?

A. We had an arrangement with the Peoples Bank here at Hickman to cash Mr. Creed's check and they used his check as a cash item.

Q. You furnished all the money that he paid for the stuff?

A. Yes sir, every dollar of it.

47 The next witness introduced on behalf of the plaintiff is Mr. JOHN S. CREED, who after being duly sworn testified as follows, to wit:

Examined in chief by Hon. J. E. Robbins:

Q. Your name is John Creed?

A. Yes sir.

Q. Where do you live?

A. Hickman, Kentucky.

Q. What is your business?

A. Farming, also grain buyer for Danke Walker Milling Co.

Q. In June 1915, was you engaged in any business for the plaintiff Danke Walker Milling Co.?

A. Yes sir.

Q. What was it?

A. Buying alfalfa, any kind of hay, grain and wheat for them.

Q. Say whether or not you were their agent at Hickman?

A. I was.

Q. How long have you been such agent for the plaintiff company?

A. I went to work for them in November 1905.

Q. Last year, 1915, in June did you make any contract with the defendant C. T. Bondurant?

A. I did.

Q. What was that contract? Wait. Did you ever make any contracts before that time or did you ever have any dealings with Mr. Bondurant prior to that time?

A. Yes sir.

Q. What had you bought before that from him?

48 A. One time I bought thirteen thousand bushels of corn, and one time I bought seven car loads at another time.

Q. Now who were you representing when you made those deals?

A. Danke Walker Milling Co.

Q. Did the defendant Bondurant know it at the time?

A. He did.

Q. Now when you made this contract with the defendant in this case, involved in this matter, when the deal was made, how much wheat did he agree to sell to you?

A. His entire wheat crop.

Q. Did he agree to sell you his entire wheat crop for the year of 1915?

Objections by the defendant.

Overruled by the court.

Exceptions by the defendant.

A. He did, he sold me the entire crop for 1915, supposed to be fourteen thousand bushels less the amount it would take to seed his crop.

Q. Where was this wheat growing?

A. On four different farms down in the bottom here.

Q. Had you seen the wheat growing?

A. Yes sir.

Q. How many acres did he have?

A. I don't know exactly, he had four tenants on his place and I don't know how many acres he had.

Q. Now under this contract, what were you to get?

A. His entire crop, and he wanted to also include the entire crop on the hill, the Tamms place too.

49 Q. When was he to deliver it, and what were you to pay for it?

A. Well it was to be represented as high as fifty eight pounds to the bushel, and I was to give him \$1.04 per bushel for it.

Q. Did he ever deliver any of it?

A. Yes he delivered a little of it, about four hundred and thirty two bushels was all.

Q. What kind of wheat was that?

A. It was very good wheat except it had a few wild onions in it.

Q. Did he ever deliver any of the rest of the wheat?

A. No sir, he did not, not to me.

Q. Well did he deliver any more of it to Danke Walker Milling Co.?

A. No sir.

Q. Who did he deliver it to?

A. To himself I think.

Q. Did you furnish the sacks?

A. Yes sir.

Q. Did he refuse to deliver the wheat to you?

A. Yes sir he did.

Q. Now when he refused to deliver the wheat to you, what did he say about it if anything?

A. Well, Chester wasn't there when they commenced hauling the wheat so I went on up there where they were hauling it, and I asked his brother Willie about it and he said that Chester was out of town and that Chester told him to hold that wheat until he come back home.

Q. Now that was the defendant's brother that told you that?

A. Yes sir, W. E. Bondurant, Willie.

50 Q. How much of that wheat did he place in the car?

A. He loaded six cars.

Q. Did he deliver it to you?

A. No sir.

Q. Why didn't he?

A. I could not tell you, he didn't?

Q. Now was there anything said about weighing it?

A. Well I bought the wheat to be delivered to me, and that is always implied that it was to be weighed over my scales.

Q. You had scales to weigh it?

A. I certainly did.

Q. Now the wheat they did deliver, where was that weighed?

A. It was weighed over my scales at East Hickman.

Q. Now why did he refuse to let you have the wheat? What reason did he give you?

A. He did not give me any reason, he was not there then, I did not see him, but he was here before the wheat was shipped out.

Q. Did he ship those six cars away himself?

A. I guess he did.

Q. Now he shipped them six cars away, do you know where he shipped them?

Objections by the defendant.

Sustained by the court.

Exceptions by the defendant.

A. Well did you get any more of the wheat?

A. No I did not.

51 Q. Do you know how much wheat there was in that lot?

A. I have never been able to find out, I know one thing, and that is that I furnished them a great number of bags over two thousand.

Q. How much did Chester claim that he would make that year?

A. He claimed he would make over fourteen thousand bushels.

Q. Now after you bought that wheat did wheat go up or down?

A. It went on up.

Q. Now on up until the 10th day of August what was it worth on the market at Hickman?

Objections by the defendant.

Sustained by the court.

Q. Well what was the highest market value up to that time?

Objections by the defendant.

Sustained by the court.

Plaintiff excepts.

By the Court: Now the market value is what its fair market price is, on the market, and not what he gave for it, or what anyone else gave for it, but it must be what its market value was then. Now Mr. Creed on the day of delivery, tell what was the reasonable vendable market value of wheat at that time?

A. Well I don't know that I could tell the exact dates they delivered this wheat, but I know that it was some time between the 20th and 30th of July, I will not be positive, but think it was between the twentieth and thirtieth of July.

Q. Now Mr. Creed, from the 25th of July until the 10th of August what were you and other grain merchants paying for wheat on the market here in Hickman on those dates, or what was the fair reasonable vendable market value of wheat at that time?

52

Objections by the defendant.

Overruled by the court.

Exceptions by the defendant.

A. It was all the way from \$1.10 to \$1.12, \$1.14 and up as high as \$1.16.

Q. Now Mr. Creed, where was he to deliver the wheat to you?

A. Here in Hickman, to be delivered to the Railroad, N. C. & St. L. R. R., and we had hands there to empty the wheat and it was to be weighed over my scales.

Q. Now when delivered to you on the cars, where was the wheat to be taken then.

Objections by the defendant.

Over-ruled by the court.

Exceptions by the defendant.

A. It was to be shipped to Union City, Tennessee.

Q. Now Mr. Creed, I here hand you a check and ask you if you executed that check, it is dated July 13th 1915, did you execute that check, to Mr. Bondurant on that date?

A. I did, that is the check that I advanced him on wheat.

Q. Tell the jury who furnished you that money that \$500.00, who furnished that to you?

Objections by the defendant.

Overruled by the court.

Exceptions by the defendant.

53 A. Danke Walker Milling Co. did, I drew a draft on them for it and the draft is there pinned on the check.

Q. Say whether or not this is the draft that I here hand you?

A. Yes sir this is the draft.

Q. The draft is for \$500.00 is it?

A. Yes sir.

Q. Now in conducting your business, what bank did you do business with?

A. Peoples Bank of Hickman, Ky.

Q. Tell how you pay, or how did you transact your business through that bank?

A. Well, we usually when wheat was weighed over my scales, I used a Danke Walker Milling Co. slip ticket, and I put the weight and price on the slip and then they could take that to the bank and the bank would cash the slips, and when stuff wasn't weighed over my scales, I usually advanced a man about 90% of it then, and then I drew a sight draft on Danke Walker for the money.

Q. Now in other words, you would advance a man about 90% then when stuff wasn't weighed over your scales, you would give a sight draft on Danke Walker Milling Co. for the money is that right?

A. Yes sir.

Q. Now is this the draft that you drew on Danke Walker Milling Co. that I hand you to replace the \$500.00?

A. Yes sir.

54 At this juncture, plaintiff reads draft to the jury and same is introduced as evidence in this case, and appears in this bill of exceptions as such, together with the original check.

Q. Now about this trade was made, where were you when you made the contract with the defendant about this wheat?

A. I was in Tom Ledford's store, grocery store.

Q. Who was present?

A. Ed White, D. B. Wilson, Tom Ledford, Finley Reynolds.

Cross-examination by Hon. W. J. Webb:

Q. When was this contract entered into between you and Mr. Bondurant?

A. To the best of my recollection it was about the fourth Monday in June.

Q. Who was present did you say?

A. Ed White, D. B. Wilson, Tom Ledford, and Finley Reynolds.

Q. They all heard the contract made did they?

A. Yes sir I think so, they were all near enough to hear it.

Q. Now you say that wheat or that contract included all the wheat that was raised on his farm?

A. Yes sir, that was my understanding, less the wheat that would take to seed his farm, less his seed wheat, he said he would have about fourteen thousand bushels.

Q. Now he sold you all the wheat that he raised, or such wheat as he owned himself, he didn't sell you any one else's wheat did he?

55 A. He didn't say anybody else's wheat would be necessary. Tom Bone was standing there, he was one of his tenants, and he asked him how many sacks it would take, and he said better have two thousand shipped down.

Q. Who said that?

A. Mr. Bondurant said that, I had a clear understanding about the sacks, and I told him that if any of the sacks were damaged, that we would have to have pay for them.

Q. Well they only directed you to send them two thousand sacks didn't they?

A. Yes sir.

Q. How many sacks did you send them?

A. I don't exactly know, but I think my books will show 2,400.

Q. How many bushels will a sack hold?

A. Two bushels.

Q. That is all the sacks that you ever delivered to Mr. Bondurant?

A. Yes sir.

Q. And that is all they ever required you to furnish them is it?

A. Yes sir.

Q. They had six cars of wheat on the tracks didn't they?

A. Yes sir.

Q. Do you know how many bushels in the entire six cars?

A. No sir, not exactly.

Q. Now about the weights, don't you know Mr. Creed, that it is a fact that that agreement was made that the wheat was to be weighed over Mr. Bondurant's scales, and to be weighed by Jack Effenger?

A. No sir.

56 Q. Don't you know that it was agreed between you and Mr. Bondurant that Jack Effenger was to do the weighing of

the wheat, and that it was to be weighed over Chester Bondurant's scales?

A. No sir.

Q. Isn't it a fact that you went down to the gin and told Willie Bondurant that?

A. No sir, I tried to get them to weigh it over my scales, and Jack Effenger would not even open the books to show me what the wheat averaged, or the sacks averaged, I went in there to see about the weights and he wouldn't let me see, he says "I hav-n't got time to show you."

Q. Now wasn't you right there, and didn't you see all that wheat weighed yourself?

A. No sir.

Q. You were not there all the time?

A. No sir I was not.

Q. Now isn't it a fact Mr. Creed, that you was right there under the advice of your lawyer to see that wheat weighed?

Objections by the plaintiff.

Overruled by the court.

Exceptions by the plaintiff.

A. No sir, well, Mr. Frank Moore says: "John you stay here and see this wheat weighed."

A. Mr. Frank Moore the attorney here was advising you to do that, and he is your lawyer isn't he?

Objections by the plaintiff.

57 Overruled by the court.

Exceptions by the plaintiff.

A. Yes sir.

Q. Now Mr. Creed, you say the market value of wheat in Hickman on July 25th to August 10th was \$1.10?

A. Yes sir. Now I am not going to attempt to give you the exact price at the exact date, for I am not positive about the exact dates and prices just to the day.

By the Court: You must answer the questions without any explanations on your part, you don't need to make any explanations to every question that is asked you, just answer his questions and don't argue the case yourself.

Q. Now I will ask you what the vendable market value of wheat was in Hickman Ky. on July 24th 1915 to August 15th?

A. It was \$1.10, or \$1.12 I don't remember which now.

Q. You say you had been Danke Walker Milling Company's agent here for several years?

A. Yes sir.

Q. For what purpose, what did you buy for them?

A. Wheat, corn, hay, grain, etc., etc.

Q. Where to be delivered?

A. Most any place that it is convenient to the railroad.

Q. Where is it then to be shipped when it gets to the railroad?

A. Shipped to Danke Walker Milling Co.

Q. Where?

A. Union City, Tenn.

Q. You say you bought hay?

A. Yes sir.

Q. They don't mill hay down there do they?

Objections by the plaintiff.

Overruled by the court.

Exceptions by the plaintiff.

A. No sir, they handle it there at the mill though.

Q. Now Mr. Creed, the wheat you have been buying for Danke Walker Milling Co., how have you been paying for that?

A. Well, if it comes over my scales, I issued a ticket on the bank or Danke Walker, put down the weight, and price, the tare and the initials of the car, and they would take that to the Peoples Bank and get it cashed there at the bank.

Q. Well do you pay by cash or check?

A. Well when I buy anything already loaded, I usually advance them 90% and give them my personal check.

Q. On what bank do you give your personal check on?

A. Peoples Bank here at Hickman.

Q. Now Mr. Creed, I will ask you if on July 24th, 1915, Mr. Bondurant didn't send for you and notify you that the six cars of wheat was then loaded in the cars at the N. & C. St. L. Railroad station?

A. He sent for me twice, he sent for me I think it was on Saturday afternoon, and I took Mr. Mit Shaw with me.

Q. Will you answer my question? Didn't he send for you and notify you that the six cars of wheat was loaded on the cars at the N. & C. Station, answer that question?

A. I was going to tell you, he sent for me twice, and the first time I went in, he didn't tell me what he wanted with me, so I went out, and a little later on I went back again and before I went back, he sends his brother after me and when I got back he told me that he wanted to tender my money back, and——

Q. Now I want you to answer my question Mr. Creed, didn't he notify you to come to his office and didn't you then go to his office and there, didn't he tell you that there was the six cars of wheat down there at the stations loaded on the cars for you?

A. Yes, but that was the second time I was in the office though.

Q. What did he tell you the first time you went there?

A. He didn't tell me anything.

Q. Then the second time you went, he did tell you that the six cars of wheat was there loaded on the cars for you didn't he?

A. Now the second time I carried Frank Moore with me, and——

Q. Will you please answer my question?

A. Yes, he told me that the second time I was there, I brought Frank Moore with me to his office and Chester says, "Here's your wheat now loaded in the cars"; says, "I'll give you thirty minutes to get the money"; says, "I will not have your check or your draft," and I says, "Will you guarantee your weights and guarantee them to hold up," and he says, "No," and then I told him I could not accept the wheat then.

Q. He did tender you the wheat and you refused to take it didn't you?

A. He tendered me the wheat on those conditions yes.

Q. Now don't you know it is a fact Mr. Creed that he tendered you the wheat and told you that he wanted the money, and didn't you tell him that you would go out and get the money and pay him for it?

A. No sir, I didn't say that.

Q. Didn't tell him you would get the money?

A. No sir, I did not.

Q. What did you do then?

A. We went and brought this suit.

Q. You brought suit for it that afternoon didn't you?

A. Yes sir, we did.

Q. Now didn't you take out an order of writ of delivery of that wheat to yourself and didn't you give bond for it and take possession?

A. Well we took out the order of delivery but we never did get possession of the wheat.

A. Mr. Creed did you ever tender Mr. Bondurant pay for these six cars of wheat?

A. No sir, we, you see he never gave me a chance to pay for it.

61 Q. Now don't you know that you all were there in the office, and you took a book or something and put down all the weights the car numbers and the amount it came to, and that Mr. Bondurant told you that you could have it by paying him for it, and didn't you tell him that you would go out and get the money?

A. No sir.

Q. Then you say you didn't offer to pay him by check or cash or any other way did you?

A. No sir.

Q. Why didn't you?

A. Because I could not take it on his weights, and on his conditions, he would not guarantee his weights to be correct.

Q. Now the only reason you didn't take it was because he didn't weigh the wheat over your scales, isn't that the reason you refused to take it?

A. No sir, he never did show me any weights at all.

Q. Now after you had already gone and brought suit, and Mr. Tyler Beale, Mr. Bondurant's secretary came and tendered you this \$500.00 back you then refused to take it didn't you?

A. It was not then that he tendered it back, he did that after Mr. Coble and I called on him, that was before this, that was about two o'clock in the afternoon, Mr. Beale was in the office then, and Chester wasn't there, so Mr. Beale said he wanted to tender me the \$500.00 and I said that if I would pay him for the wheat that he would turn it all over to me, so then Mr. Coble left on the 2:30 train, then is the time they offered to tender the money back.

Q. You never did offer to pay Mr. Bondurant for this wheat did you?

62 A. Well if the wheat had been guaranteed to come up in weights he could have gotten his money.

Q. Did you ever offer at any time to pay him for this six cars of wheat, answer the question?

A. No sir.

Q. All right: now about those sacks, did anyone else use any of them except Mr. Bondurant?

A. Somebody might have used some of them, but I don't know for sure about that.

Q. Isn't it a fact Mr. Creed that you had them loaning these sacks out all over the country to anybody that came there for them?

A. No sir, well some times, people would come and get sacks when I wasn't here, we kept them in Ledfors & Randle's warehouse.

Q. What kind of condition were they in when Mr. Bondurant got them if you know?

A. In good condition.

Q. Well if you were not there all the time, you could not say who all got them could you?

A. No I couldn't be positive I wasn't there all the time.

Redirect examination by Hon. J. E. Robbins:

Q. Mr. Creed do you remember the date it was that they called on you and demanded their money and demanded that you get it in thirty minutes?

A. I think it was the fourth Saturday evening in July, 1915.

Q. What time in the afternoon?

63 A. I think about 6:30 when they demanded the money, I know it was late.

Q. Now about 2:30 in the afternoon, you say they tendered you this \$500.00 back?

A. Yes sir.

Q. And at six thirty in the evening, they demanded their money for this wheat, and demanded it in thirty minutes?

A. Yes sir.

Q. The banks at that time had all closed hadn't they?

A. Yes sir, long before that.

Q. He had never made such demands as this of you before had he?

A. He never did.

Q. What was the market value of wheat then at Hickman?

A. \$1.10 to \$1.12 I believe.

Q. Now after six o'clock, when all the banks had closed, he told you that he would give you thirty minutes to get the money.

A. He said he would give me thirty minutes to get the cash, said he wouldn't take my check or draft, he wanted the cash.

Q. He wouldn't accept your check or draft either?

A. No sir.

Q. You had been having a great many dealings with him you say, how had you been paying him before this time?

A. Well, I would issue him a ticket for it on their ticket slips.

Q. Did he ever make a demand like that on you before?

A. No sir, nor since either.

Q. Who was present when he made that demand on you?

64 A. Frank Moore was present on my side, and Chester had Mr. Webb here in the office too, and there was quite a crowd there.

Q. Now you say that you proposed to him that if he would guarantee the weights or make affidavit that they were correct, that you would get him the money, and he refused to do that?

A. Yes sir.

Q. Now in the contract, who was to weigh this wheat?

A. Me and my men were to weigh it.

Q. You and your men?

A. Yes sir.

Q. Now in all of your dealings with him in buying grain, where was all of it weighed before this time?

A. Well I bought thirteen cars one time and they were weighed at Union City, Tenn.

Q. On whose scales were those thirteen cars weighed.

A. On Dahnke-Walker Milling Co.'s scales.

Recross-examination by Hon. J. W. Webb:

Q. Mr. Creed, that was the stuff that was delivered at Union City, Tennessee?

A. Yes sir.

Q. He asked you about all the stuff that you bought from Mr. Bondurant delivered here, on whose scales was it always weighed?

A. Sometimes they did the weighing, and sometimes I did it, and lots of the stuff would be weighed there at the river there where it was unloaded, and whenever it was loaded there at the river, it would be weighed there, and they would guarantee the weights to us.

65 Q. Now Mr. Creed, he asked you about the banks being closed, is it not a fact that at that time of the year, the banks on Saturday nights in Hickman stayed open until 8:30 to 9:00 and 9:30 o'clock.

A. Well that might be, but I am not sure.

Q. You won't say they did close before that?

A. No sir.

66 The next witness introduced on behalf of the plaintiff is Mr. J. E. COBLE, who after being duly sworn testified as follows, to wit:

Examined in chief by Hon. J. E. Robbins:

Q. Mr. Coble, where do you live?

A. Union City, Tennessee.

Q. What official position do you hold with the plaintiff company Dahnke Walker Milling Co?

A. Vice-President.

Q. Last year, what was your company engaged in?

A. Buying wheat, and all kinds of grain, feed stuffs, etc., etc.

— Now this particular wheat that was bought of Mr. Bondurant through your agent Mr. Creed, tell the jury where that wheat was to be taken?

A. To Union City.

Q. Union City, Tennessee?

A. Yes sir.

Q. How long you been in the mill business?

A. Ever since 1907.

Q. Did you have anything to do with this transaction in this case?

A. Yes sir, I went down to see Mr. Bondurant after he had refused to deliver the wheat.

Q. What conversation did you have with him if any.

A. Well, during the season of the year that year, we——

Q. First let me ask you this, at that time, did you know the reasonable vendable market value of wheat at Hickman and vicinity?

67 Objections by the defendant.

Overruled by the court.

Exceptions by the defendant.

A. Yes sir.

Q. What was it.

A. It was from a dollar sixteen to a dollar eighteen.

Q. What was the general tendency of the market at that time? was it going up or down?

A. It was advancing all the time.

Q. Now you say you had a conversation with Mr. Bondurant?

A. Yes sir.

Q. What did he say the reason was he didn't deliver the wheat?

A. I asked him why he was not delivering the wheat according to the contract?

Q. What did he say then?

A. He never did make me any definite reply as to why, then I called his attention to the condition of the wheat here sitting on the side track, and had a few words more about it with him, and he told me that that was none of my business.

Q. Well did he make the complaint to you that you could not pay him the cash for the wheat?

A. No he didn't make any complaint then about not paying him, he was just fidgeting around there, and never did give me any definite reply.

Q. At that time what was the price of wheat on the market at Hickman?

Objections by the defendant.

68 Sustained by the court.

Exceptions by the plaintiff.

Avowal: The attorney for the plaintiff announced to the court that if the witness were permitted to answer the question he would state that the market then was from \$1.12 to \$1.14, and to which ruling of the court the plaintiff excepts.

Q. Now at the time this wheat was standing on the track in the cars, and he refused to let you have it, what was the reasonable vendable market value of wheat on the Hickman Market?

Objections by the defendant.

Overruled by the court.
Exceptions by the defendant.

A. From \$1.12 to \$1.14.

Q. What was your object in coming to see Mr. Bondurant?

Objections by the defendant.
Overruled by the court.
Exceptions by the defendant.

Q. Because we were not getting the wheat, and we wanted to know just where we stood, and why we was not getting the wheat.

Q. Did he refuse then to let you have it?

A. He did.

Q. Did he give you any other reason except to tell you that it was none of your business?

A. No sir.

Q. Say whether or not you was ready and willing to pay
69 him for the wheat at that time?

A. I was, and had been expecting the wheat for ten days or more before that.

Cross-examination by Hon. J. W. Webb:

Q. Mr. Coble, you was here in Hickman on Saturday wasn't you?

A. Yes sir.

Q. That was on Saturday afternoon July 24th, 1915, wasn't it.

A. I don't know the exact date, but I know that it was on the same day that this suit was brought?

Q. Now on that day, do you say that Mr. Bondurant refused to deliver that wheat to you?

A. He did, yes sir.

Q. Now what did he say about it?

A. I don't know what all he did say, you was present yourself.

Q. Do you say that I was present when he refused to pay you?

A. I know that I saw you there in the office, and you know that the proof is here that he did refuse to deliver it.

Q. Did he refuse to deliver you that wheat on that day?

A. Yes sir.

Q. Did you demand that he deliver that wheat to you on that day?

A. I come to ask him if he was going to deliver the wheat, and if not why not, so that we would know just where we were and what to depend on at the mill, and I told him that the wheat standing there on the track would damage on account of demurrage and that
is the reason I brought this suit.

70 Q. Now just tell what he said when he refused to let you have it?

A. I don't remember exactly what all now.

Q. Do you remember anything that he said?

A. He told me that it was not any of my business about the condition of the wheat, the demurrage or anything else. I know that he delivered to refuse it, and I went to Mr. Moore's office and brought this suit, I employed him.

Q. Now you left Hickman at 2:30 didn't you?

A. Yes sir, but I gave orders to Mr. Moore for the rest.

Q. Did you offer to pay Mr. Bondurant for that wheat?

A. No sir, Mr. Bondurant knew the terms and there was no question about him not getting the pay for the wheat, he knew that.

71 The next witness introduced on behalf of the plaintiff is Mr. WATERFIELD, who, after being duly sworn, testified as follows, to wit:

Examined in chief by Hon. J. E. Robbins:

Q. Mr. Waterfield, where do you live?

A. Union City, Tenn.

Q. What is your business?

A. I am in the grain business.

Q. How long have you been in that business?

A. About fifteen years.

Q. Were you in that business last August?

A. Yes sir.

Q. Last August, last July and August, did you know the vendable market value of wheat here in Hickman?

A. I did.

Q. Just tell the jury what the market value of wheat was from the 20th day of July until the 10th of August?

A. Well, I could not answer that positively as to those exact dates, not as late as August 10th, but the latter part of July, the market value of wheat in Hickman was \$1.18.

Q. What was the general trend or tendency of wheat that season up or down?

A. It was going up all the time.

Q. Now can you give exactly the market value of wheat from the 25th of July until the 25th of August?

Objections by the defendant.

OVERRULED by the court.

Exceptions by the defendant.

72 A. No sir, I don't know the market no longer than the latter part of July, about the 20th of July.

Q. Well, how did the market run at that time?

Objections by the defendant.

By the Court: The evidence shows that on the 24th day of July a part of this wheat in controversy was threshed and ready for delivery and you will have to confine your questions and answers from the 24th of July until the 10th of August.

Q. Well what was the market value of wheat on July 24th if you know, the vendable market value?

A. I could not testify beyond the 20th day of July, but I can give you my best recollection of what the market was then.

Objections by the defendant as to what his recollection was.

SUSTAINED by the court.

Exceptions by the plaintiff.

By the Court: You have not introduced any evidence to show that the 20th of July was the date of delivery.

Q. Well tell what the market value of wheat was from the 13th of July until the 20th of July, you say you know what it was then, what was the market price from the 13th to 20th?

Objections by the defendant.

Overruled by the court.

Exceptions by the defendant.

A. Well on the 13th day of July it was worth \$1.11 and on the 14th of July it was one cent more, making \$1.12 and on the 16th it was \$1.15 and the same price on the 17th and then the market
73 never made any change for the next week.

Q. Now up to the 20th of July, that was the schedule of the market from the 13th to 20th?

A. Yes sir.

Cross-examination by Hon. W. J. Webb:

Q. Were you on the Hickman market during any of that time?

A. No sir.

Q. Did you buy any wheat here during that time?

A. No sir.

Q. You didn't buy any wheat in this vicinity during that time did you?

A. No sir.

Q. And you say you wasn't on the market during that time?

A. No sir.

74 The next witness introduced on behalf of the plaintiff is Mr. ED FLEGLE, who, after being duly sworn, testified as follows, to wit:

Examined in chief by Hon. J. E. Robbins:

Q. Where do you live Mr. Flegel?

A. Clinton, Kentucky.

Q. Did you live there last July and August.

A. Yes sir.

Q. What is your business?

A. Mill business, flour, meal and grain.

Q. Now do you know what the market value of wheat was on the Hickman market and vicinity from the 13th of last July until the 10th of August, the vendable market?

A. Yes sir.

Q. Tell the jury what it was?

A. It run from \$1.10 to \$1.15.

Q. What was the tendency of the market then?

Objections by the defendant.

Overruled by the court.

Exceptions by the defendant.

A. Going up, the market was going up.

Q. Tell the jury whether or not you are in any way interested in this case?

A. I am not.

Cross-examination by Hon. W. J. Webb:

Q. Mr. Flegle, were you on the Hickman market during any of that time?

75 A. No sir.

Q. You didn't buy any wheat or sell any on this market at that time did you?

A. No sir.

Q. You was not here yourself and didn't have any buyer here?

A. No sir.

Redirect examined by Hon. J. E. Robbins:

Q. You bought wheat around Clinton didn't you?

A. Yes sir.

Q. Say whether or not the market on wheat is the same in a radius of forty miles? of these stations?

Objections by the defendant.

Overruled by the court.

Exceptions by the defendant.

A. It is, always.

Recross-examined by Hon. W. J. Webb:

Q. You say it is the same?

A. Yes sir, it is supposed to be.

Q. Now doesn't the freight rates to the markets have a great deal to do with the market?

A. It is owing to what point you are going to ship to?

Q. Well, shipping wheat from here to Nashville, the freight rates wouldn't be as good as it would out of Clinton would it?

A. Exactly the same rates.

76 Q. You are on the Illinois Central and in direct connection with the Nashville and St. Louis markets also are you not from your town?

A. Yes sir.

Q. Well isn't the fact that you are situated that way make a better rate for you than from here?

A. No sir, I think not.

Q. You don't know where all the wheat goes from this town do you?

A. No sir.

Q. You are connected with the Kevil Milling Co. of Clinton?

A. Yes sir.

77 The next witness introduced on behalf of the plaintiff is Mr. J. B. JOHNSON, who, after being duly sworn, testified as follows, to wit:

Examined in chief by Hon. J. E. Robbins:

- Q. Mr. Johnson *were* do you live?
A. Here in Hickman.
Q. What is your business?
A. Agent for the C. M. & G. R. R.
Q. Were you agent for this company last July and August?
A. Yes sir.
Q. Do you know the defendant Mr. Chester Bondurant?
A. Yes sir.
Q. Say whether or not he shipped any wheat over your line out of Hickman in July?
A. He did.
Q. How much did he ship?
A. I think it was twelve cars.
Q. You think it was twelve cars?
A. Yes sir.
Q. Do you know exactly the weight of the twelve cars?
A. I do.
Q. What was the weight of the twelve cars?
A. 567,780 pounds.
Q. Whose wheat was that?
A. Mr. Bondurant's.
Q. Where did he ship it to?
A. Nashville, Tenn.
78 Q. Do you know whether or not he shipped any other wheat by boat?
A. I don't know whether he did or not.
Q. Now to whom did he ship this wheat to?
A. To himself.
Q. In Nashville?
A. Yes sir.
Q. What is the freight rate on wheat in car load lots from Hickman, Ky., to Nashville, Tenn.?
A. Ten cents per 100 pounds.
By the Court: How many pounds did you say it was?
A. I said 576,780.

Cross-examination by Hon. W. J. Webb:

- Q. Now do you know where that wheat came from?
A. No sir.
Q. You don't know whether it was raised on Mr. Bondurant's farm or whose do you?
A. No sir.
Q. You don't know whether he bought that wheat from some one else or not do you?
A. No sir.
Q. All you know is that there was that many pounds of wheat shipped in his name to himself at Nashville; isn't that all you know?
79 A. Yes sir, that is all I know about it.

Q. As to where the wheat came from you couldn't say,

could you?

A. No sir.

80 The next witness introduced on behalf of the plaintiff is Mr. TRAVIS, who, after being duly sworn, testified as follows:

Examined in chief by Hon. J. E. Robbins:

Q. Mr. Travis, what is your business?

A. Cashier of Peoples Bank of Hickman.

Q. What was your business last July and August?

A. Same business.

Q. Do you know Mr. Bondurant here?

A. Yes sir.

Q. Do you know the Danke Walker Milling Co.?

A. Yes sir.

Q. Did you pay their checks for wheat last years?

A. Yes sir.

Q. What arrangements did you have about paying their checks or cashing their tickets issued by Mr. Creed, if any?

Objection by the defendant.

Overruled by the court.

Exceptions by the defendant.

A. We had an arrangement that we would cash their tickets or pay their drafts when signed by Mr. Jno. B. Creed.

Q. Now what firm was it that you had that kind of arrangement with?

A. The Danke Walker Milling Co. of Union City, Tennessee.

Q. What did you cash them for?

A. Wheat, corn, hay or anything they bought.

Q. You know nothing about their contract about this transaction do you?

81 A. I do not.

Q. Now under that arrangement, say whether or not you were always ready to pay for all the wheat they bought here?

A. Yes sir, we always did do it.

Cross-examination by Hon. W. J. Webb:

Q. Now Mr. Travis, on Saturdays, during the summer months, and on last July 24th 1915 on Saturdays what time did your bank close then?

A. Some times we stayed open as late as 9 o'clock at nights, but usually open until 8 to 8:30.

Q. It was your custom to be open that long on Saturdays was it?

A. Yes sir.

Q. Now on July 24th, 1915, Saturday evening, say whether or not Mr. John Creed had as much as \$4,544.25 to his credit in your bank?

A. Well, I couldn't tell without referring to my books.

Q. Your books will show won't they?

A. Yes sir.

Q. Would you be willing to bring your books and give us the amount he had to his credit at that time?

Objections by the plaintiff.

Sustained by the court.

By the Court: I don't think that would be material to this case, and for this reason: The evidence shows conclusively that this sale or contract was made with Creed as the agent for the Danke
82 Walker Milling Co., and I don't think there is any issue as to the paying for this wheat unless it was that this agent refused to act at this particular time in paying for the wheat.

To which ruling the defendant excepted at the time and still excepts.

Q. Now, if later on it became proper, state whether or not you will examine your books and report whether or not Mr. Creed has as much as \$4,544.25 to his credit personal credit at that time, will you do that?

A. I certainly will, if the court permits me to.

Redirect by Hon. J. E. Robbins:

Q. If he had of given you a check for that amount at that time Mr. Travis, say whether or not you would have cashed the check?

A. I would, I never did refuse to pay one of his checks.

83 The next witness introduced on behalf of the plaintiff is Esq. SHAW, who, after being duly sworn, testified as follows, to wit:

Examined in chief by Hon. J. E. Robbins:

Q. Mr. Shaw, what is your business?

A. Farming.

Q. Where?

A. Here in this country, or vicinity.

Q. Did you deal in grain any last year?

A. Yes sir.

Q. Do you know what the vendable market value of wheat was during July and up to the 10th of August, 1915?

A. I don't believe I could say from the fact that I don't think I was paying any attention to the market, my wheat delivery was all over with by that time.

Q. When did you buy wheat?

A. June 1st and around up to the first of July.

Q. Along about that time, what was wheat going at?

Objections by the defendant.

Sustained by the court.

Exceptions by the plaintiff.

Q. Do you know what was the market up as late as July 13th?

A. No sir, my wheat season was over with by that time, and I didn't pay any attention to the markets after that.

Q. Do you know what the price of wheat was on the first of July?

Objections by the defendant.

Sustained by the court.

Exceptions by the plaintiff.

84 Avowal: At this juncture attorney for the plaintiff announced to the court that if the witness were permitted to answer the question he would state that at the first of July it was worth from \$1.10 to \$1.12 and to the ruling of the court the plaintiff excepted at the time and still excepts.

85 The next witness introduced on behalf of the plaintiff is Mr. TOM LEDFORD, who, after being duly sworn, testified as follows, to wit:

Examined in chief by Hon. J. E. Robbins:

Q. Where do you live?

A. I live here at Hickman.

Q. What is your business?

A. Grocer business.

Q. Do you remember the contract between Mr. Bondurant and Mr. Creed, the day they were in your store when the contract was made, did you hear that contract?

A. Yes, they were in my store when they made the contract.

Q. Did he make the contract in your presence, or did you hear the contract?

A. Yes sir.

Q. Tell the jury what that contract was?

A. Well Mr. Bondurant sold Creed his wheat for \$1.04.

Q. Where was that wheat to be delivered?

A. I didn't hear them say anything about when it was to be delivered.

Q. Did you hear them say anything about how much wheat he was buying.

A. No sir, they didn't say how much in my presence, I just remember that he bought Mr. Bondurant's wheat.

Q. Do you know where the wheat was growing?

A. No sir.

Q. His land was down in the bottom wasn't it?

86 A. Yes sir.

Q. Didn't you own land down there too?

A. Yes sir.

Q. Do you know how many acres Mr. Bondurant had down there?

A. Think about five hundred acres.

Q. About five hundred.

A. Yes sir.

Q. About what time did Mr. Bondurant get through threshing his wheat?

A. Well Mr. Bondurant was late, he had contracted with me to thresh my wheat first and I threshed about the 10th of July and he threshed after I did and I think it sat in to raining and he was two or three weeks threshing his wheat.

Q. Do you know anything about the quality of his wheat?

A. Yes sir, it was good wheat.

Q. Good wheat?

A. Yes sir.

Cross-examination by Hon. W. J. Webb:

Q. Mr. Ledford, was there anything said in that contract about the quantity of wheat, or any statement as to there being fourteen thousand bushels of wheat, or any other amount that you remember of?

A. No sir.

Q. You never heard any statement in the contract like that did you?

A. No sir.

87 Q. You said he had five hundred acres, you mean that there was that much growing on his land don't you?

A. Yes sir.

Q. He worked his land on the shares didn't he, and don't you know it is a fact that lots of that land was rented out for money rent?

A. Yes sir.

Q. Do you know how much wheat Mr. Bondurant had individually?

A. I do not.

Q. You don't know anything about how many acres he had of his own do you?

A. No sir.

Q. Now was there anything said about where the wheat was to be weighed or who was to weigh it?

A. I didn't hear anything.

Q. Hear anything said in the contract about the date the wheat was to be delivered?

A. No sir.

Q. You say you did not hear them say anything about any date?

A. I did not.

Q. You heard the conversation didn't you?

A. Yes sir.

Q. Well couldn't you have heard it if they had said anything about the date?

A. I suppose so.

Q. Now you said your wheat was threshed about the 10th of July didn't you?

88 A. Yes sir.

Q. How long were you engaged in threshing your wheat?

A. About a week.

Q. How were the weather conditions up until the 24th day of July.

A. Had a good deal of rain I think.

Q. Tell the jury whether or not that had a tendency to interfere with threshing the wheat.

A. Yes sir, it did.

Q. Now do you know anything about those sacks?

A. No sir, not a thing.

89 The next witness introduced on behalf of the plaintiff is Mr. Ed. WHITE, who, after being duly sworn, testified as follows, to wit:

Examined in chief by Hon. J. E. Robbins:

Q. Where do you live Mr. White?

A. Union City, Tennessee.

Q. What is your business?

A. Commercial traveling man.

Q. Are you often in this town?

A. Yes sir.

Q. Do you remember having been here, or being here at a time when a contract was made between Mr. Bondurant and Mr. Creed about the sale of Mr. Bondurant's wheat crop to Mr. Creed?

A. Yes sir.

Q. Where was that contract made if you know?

A. In Mr. Ledford and Randle a store.

Q. Tell the jury what that contract was?

A. Well Mr. Creed bought Mr. Bondurant's wheat and was to pay him \$1.04 per bushel for it.

Q. Do you know how much he bought from Mr. Bondurant?

A. He bought all he had except his seed wheat to seed his land.

Q. Do you know anything about the market value of wheat in this country from the 13th of July until the 10th of August of last year?

A. I do not.

90 Cross-examination by Hon. W. J. Webb:

Q. Now in that contract that you heard, was there anything said about how many bushels of wheat he bought?

A. I didn't hear anything about that.

Q. Anything said about where it was to be delivered?

A. Didn't hear anything about that.

Q. All you know is that he sold Mr. Creed his wheat for \$1.04, all he had except his seed wheat, and that is all you do know, isn't it?

A. Yes sir.

91 The next witness introduced on behalf of the plaintiff is Mr. D. B. WILSON, who, after being duly sworn, testified as follows:

Examined in chief by Hon. J. E. Robbins:

Q. Where do you live, Mr. Wilson?

A. Hickman, Ky.

Q. How long have you lived here?

A. Thirteen years.

Q. Do you remember being present when Mr. Creed bought Mr. Bondurant's wheat crop?

A. Yes sir.

Q. Just tell the jury what the contract was?

A. Well Mr. Creed bought his wheat at \$1.04 per bushel.

Q. Do you remember anything about how much Mr. Bondurant was to retain out of his crop?

A. Nothing but his seed wheat I believe.

Cross-examined by Hon. W. J. Webb:

Q. Did they say anything about how many bushels?

A. No sir.

Q. Did they say anything about where it was to be weighed?

A. No sir.

Q. Say anything about where it was to be delivered?

A. At Hickman.

Q. Were you familiar with Mr. Bondurant's wheat crop?

A. No sir; I was only down there one day at his crop.

Q. All you know is that he bought Mr. Bondurant's wheat at \$1.04 per bushel and that is all you know about it.

A. Yes sir.

92 Redirect examined by Hon. J. E. Robbins:

Q. Do you know how long Mr. Creed at that time had been buying for the Danke Walker Milling Co.

Objections by the defendant.

Overruled by the court.

Exceptions by the defendant.

A. A number of years.

By the Court: When the contract was made between Mr. Bondurant and Creed, was there anything said about who was to get the wheat?

A. No, I think not, but I think Mr. Creed said something about phoning to his people about getting some word from his people about it.

By J. E. Robbins, for plaintiff:

Q. Who was his people?

A. Danke Walker Milling Co.

93 The next witness introduced on behalf of the plaintiff is Mr. BEN BRIGGS, who, after being duly sworn, testified — follows:

Examined in chief by Hon. J. E. Robbins:

Q. Where do you live?

A. In Hickman.

Q. Do you remember Mr. Creed buying Mr. Bondurant's wheat crop?

A. Yes sir.

Q. Did you weigh the wheat?

A. Yes sir.

Q. Where?

A. At East Hickman.

Q. When you weighed the wheat, what did you issue to Mr. Bondurant for the wheat?

A. I didn't issue anything to him. I gave the weights to a fellow by the name of Smith I think it was.

Q. Now what kind of slip or ticket did you make the weights out on, on whose tickets, or whose name appeared on the slips?

A. Danke Walker Milling Co.'s.

Q. They got the money on them from Danke Walker Milling Co., did they not?

A. I couldn't tell you.

Q. Did you put any price on the tickets or slips?

A. No sir.

Q. Why didn't you?

A. I was authorized not to.

Q. For what reason?

94 A. Well something was said about some bottom wheat, and said as soon as it was in, or as soon as it come in that he would give me the price and——

Objections by the defendant.

By the Court: Who said that and who were they talking to?

A. I don't remember exactly now who said that, but I do remember something being said about some other wheat, and it seems to me like Mr. Creed is the one that said that to me.

Objections sustained by the court.

Exceptions by the plaintiff.

Q. Was Mr. Bondurant there at that time?

A. No sir.

Q. You say he wasn't there?

A. No sir, well he was around there somewhere, but I don't think he heard the conversation.

Q. Those tickets you say were delivered to a fellow by the name of Smith?

A. Yes sir.

Cross-examination by Hon. W. J. Webb:

Q. Now don't you know that it is a fact that Mr. Bondurant was not even in town when this occurred?

A. I can't say whether he was or not now.

Q. Which one of the Bondurants are you talking about?

A. Willie Bondurant, W. E.

Q. You had reference to Willie Bondurant?

A. Yes sir.

- 95 The next witness introduced on behalf of the plaintiff is Mr. JACKSON, who, after being duly sworn, testified as follows:

Examined in chief by Hon. J. E. Robbins:

- Q. Where do you live?
A. Here in Hickman.
Q. What was your business last summer?
A. Operating a threshing machine or wheat thresher.
Q. Did you thresh Mr. Bondurant's wheat?
A. Yes sir.
Q. How many bushels did he thresh or how many did you thresh for him last year?
A. I don't know.
Q. Well do you have any idea?
A. I do not.
Q. Who kept the account of that?
A. They did. I was working by the day and had nothing to do with that part of it.
Q. Whose thresher was that you was operating?
A. It was theirs.
Q. Whose?
A. Bondurant's.
Q. How many days were you threshing his wheat?
A. I think about eighteen days in all.
Q. How many bushels per day could you thresh with that machine?
A. I guess about eight hundred bushels a day.

Cross-examination by Hon. W. J. Webb:

- 96 Q. Say whether or not it was raining during any of the time you were threshing Mr. Bondurant's wheat?
A. Yes sir, part of the time it was.
Q. Did you thresh eighteen days solid, or were you interfered with by the rain?
A. I would not say that we was threshing eighteen solid days.
— The rain did interfere with your threshing didn't it?
A. Yes sir.
Q. Now you don't know whose wheat that was, only that you know that it was raised on Mr. Bondurant's land did you?
A. No I don't know whose it was.

- 97 The next witness introduced on behalf of the plaintiff is Hon. F. S. MOORE, who, after being duly sworn, testified as follows, to wit:

Examined by Hon. J. E. Robbins:

- Q. Mr. Moore, last August did you have any kind of transaction with Mr. Chester Bondurant about some wheat?
A. Yes sir.

Q. Now just tell the jury all you did, and all you know about that transaction.

A. Well, me and Mr. Creed went into Chester's office on his invitation and he said that he wanted to tender us the wheat, and when we went in there, he had some figures there on an envelope, and my recollection is that the whole thing amounted to about \$4,500.00, and Chester says, "I here tender you this wheat and want the cash"; he had his attorney, W. J. Webb, there in his office, so I just laughed and says, "Why you haven't made us any tender of any wheat"; I says you haven't got any wheat; I says, "You go and get your bills of lading and sign them over to us, and we will get you the cash."

Q. Did he say anything about not taking your check or draft?

A. Well, then Mr. Creed says, "No," we will not give you the cash unless you will verify your weights as to them being correct, and then I says, "Well who weighed the wheat?" and I think that he said it was weighed on his scales by Jack Effenger, and I says, "Well, then he would weight it correctly, and if he will swear to it, that will be sufficient," and then Chester said that he would not swear to anything, and if we couldn't get up the cash and take his figures
98 for it, that we would not get the wheat.

Q. Now how long did he say he would give you to get the cash?

A. I don't remember now of any time he said about that.

Q. Did he or not say that he would just give you thirty minutes to get the cash?

A. He might have, I just don't remember now. I know that it was late in the afternoon and the banks were about ready to close, but we could have gotten the money if he had of gotten the bills of lading and signed them over.

Q. He refused to verify the weights and sign over the bills of lading to you and refused to guarantee the weights didn't he?

A. He did, said he would not swear to the weights at all, and I don't know just what he did say now about the bills of lading, but I told him to go and get up his bills of lading and sign them over to us and we would get him the cash?

Q. Anyway he didn't go get the bills of lading did he?

A. He did not.

Cross-examination by Hon. W. J. Webb:

Q. You didn't get the cash either did you Frank?

A. No, we went up to the bank and found out that we could get the money and when we come back Chester was gone.

Q. How long after you left was it until you come back?

A. While I was in the bank I saw Chester going by the
99 Peoples Bank, while I was in there talking to the Cashier, and the cashier in that bank told us that he could not let us have that much money there, so we went on to the other bank to see if we could make arrangements there for the money, and we found out that we could have gotten it all right there.

Q. The banks then stayed open until about 8:30 to 9.00 o'clock on Saturday nights did they not?

A. I don't know about that I don't think they kept open regularly

that late, only on Saturday nights they might have, but not regularly.

Q. This all happened on Saturday afternoon did it not?

A. I don't think it did, I am not sure—Yes I believe it did.

Q. Well it was on the 24th day of July that you filed this suit was it not, and didn't you file this suit that same afternoon?

A. Yes, you are right.

Q. Then that was on Saturday night was it not?

A. Yes sir.

Q. Now Frank is it not a fact that this suit had already been prepared by you when you all were in that bank?

A. No sir, I know that we went right straight from the bank after we had gone back to the office, then we came back to the bank and I prepared this suit and we came on up here to the courthouse and filed it that afternoon about five o'clock.

Objections by the plaintiff.

Sustained by the court.

Exceptions by the defendant.

100 Q. Had Mr. Coble gone home at that time?

A. I don't remember whether he had or not.

Q. Isn't it a fact that he left on the 2:30 train that afternoon?

A. If he did, that was before this happened I know that.

Redirect examination by Hon. J. E. Robbins:

Q. When did you file this suit, Frank, before or after you had the conversation with Chester Bondurant there?

A. It was after that.

Q. When he refused to let you have the wheat, you then filed suit didn't you?

A. Yes sir.

Q. And you didn't file suit until after he had already refused to turn over this wheat, did you?

Objections by the defendant.

Sustained by the court.

Exceptions by the plaintiff.

101 J. E. COBLE is recalled to testify on recross-examination:

By Hon. J. W. Webb:

Q. Mr. Coble, didn't you sign a statement on the 24th of July on the occasion that this wheat transaction took place, that this wheat was worth \$1.04 per bushel, which statement you verified by oath before a Notary Public?

A. I may have made it, we were paying \$1.04 and if I did, I meant to verify the price we paid for it.

Q. Didn't you make this statement which is here in the papers that I show you which reads as follows: "We are owners of this wheat at \$1.04 per bushel"?

A. If I did, it was to establish the price that we were paying.

Q. Didn't you sign this affidavit?

A. Yes sir and I recognize the statement you are talking about now.

Q. I will ask you if this is not in the statement when you swore to it: Reads as follows: "Of the value of \$1.04 per bushel" didn't you sign this statement and swear to it?

A. Yes sir I signed it and swore to it.

Be it further remembered that at the conclusion of the plaintiff's evidence, the defendant moved the court to give to the jury instruction "A" which is in words and figures as follows: "The court instructs the jury to find for the defendant" and to which the plaintiff objected, but the court overruled the objection, and gave said instructions, and to the ruling of the court, the plaintiff excepted.

Be it further remembered that the foregoing evidence was all that was heard upon the trial of this case, and instruction A was the only instruction given; and this bill of exceptions is true.

I, B. H. Haskins Official Court Stenographer do hereby certify that the foregoing is a true and correct copy of all the evidence given by the plaintiff upon the trial of this case, showing all objections and exceptions, avowals, exhibits, etc., that were used upon said trial.

Given under my hand this May 15th, 1918.

B. H. HASKINS,
Official Stenographer.

Examined and approved by—

BUNK GARDNER,
Judge Fulton Circuit Court.

Filed May 15, 1918.

W. L. HAMPTON, *Clerk.*

STATE OF KENTUCKY,
County of Fulton:

I, W. L. Hampton, Circuit Court Clerk of Fulton County, Kentucky, hereby certify that the above and foregoing is a true and complete copy of the record in the case of Dahnke-Walker Milling Company against C. T. Bondurant lately pending in the Fulton Circuit Court, as the same now appears of record and on file in my office.

Witness my hand as Clerk of said court, this the — day of July, 1918.

W. L. HAMPTON,
Clerk Fulton Circuit Court.

105 And with said record the following statement was filed:

106 *Statement.*

Court of Appeals of Kentucky.

DAHNIKE-WALKER MILLING COMPANY, Appellant,

VS.

C. T. BONDURANT, Appellee.

The judgment appealed from in this case was rendered on the 8th day of May, 1918, in the Fulton Circuit Court, and is found on page 28 of the record.

No summons or warning order is required.

Robbins & Robbins, of Mayfield, Kentucky, are attorneys for appellant; and W. J. Webb of Mayfield, Kentucky, and B. T. Davis, of Hickman, are attorneys for the Appellee.

(Signed)

ROBBINS & ROBBINS,
Att'ys for Appellant.

107 Be it remembered that at a Court of Appeals, held at the Capitol in Frankfort on the 6th day of December, 1918, the following order was entered:

DAHNIKE-WALKER MILLING CO.

V.

BONDURANT.

Fulton.

This case is ordered to be submitted.

108 Be it remembered that afterwards, at a Court of Appeals held as aforesaid on the 17th day of October, 1919, the following judgment was entered:

DAHNIKE-WALKER MILLING Co., Appellant,

VS.

C. T. BONDURANT, Appellee.

Appeal from the Fulton Circuit Court.

The Court being sufficiently advised, it seems to it there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed. Which is ordered certified to said court.

It is further considered that the appellee recover of the appellant his costs herein expended.

And on said day the following opinion was rendered:

109 Court of Appeals of Kentucky, October 17, 1919.

DAHNKE-WALKER MILLING Co., Appellant,

vs.

C. T. BONDURANT, Appellee.

Appeal from Fulton Circuit Court.

Opinion of the Court by Judge Clarke, Affirming.

This is an action by the Dahnke-Walker Milling Company against C. T. Bondurant to recover damages for a breach of contract. Upon a former appeal of the case a judgment in favor of the plaintiff was reversed upon the ground that the contract was unenforceable by the plaintiff, a foreign corporation, because of its failure to comply with section 571 of Kentucky Statutes; and the cause was remanded for a new trial with directions to direct a verdict for defendant if
110 the evidence should be the same as on the first trial. See Bondurant vs. Dahnke-Walker Milling Co., 179 Ky. 774.

The evidence being the same upon the second trial as upon the first, the trial court in obedience to the mandate of this court directed a verdict for the defendant and dismissed the petition from which judgment the plaintiff has prosecuted this appeal.

Since no question of either fact or law, not decided by our former opinion in this case, is presented by this appeal, and the judgment now appealed from was rendered in obedience to our mandate and in conformity with our view of the law, as fully set forth in that opinion, reported in 179 Ky. 774, and to which we adhere, it is obvious that the judgment must be and it is affirmed.

W. J. Webb, Mayfield, Ky.; B. T. Davis, Hickman, Ky., for Appellee.

Robbins & Robbins, Mayfield, Ky., for Appellant.

A. C.

111 Be it remembered that afterwards, to wit, on the 8th day of January, 1920, the appellant, Dahnke-Walker Milling Company, filed in the office of the Clerk of the Court of Appeals of Kentucky an Assignment of Errors and which is hereto attached and is as follows:

Assignment of Errors.

The Supreme Court of the United States.

DAHNKE-WALKER MILLING COMPANY, Plaintiff in Error,

vs.

C. T. BONDURANT, Defendant in Error.

On this 8th day of January, 1920, comes plaintiff in error, Dahnke-Walker Milling Company, by Joseph E. Robbins and John C. Robbins, its attorneys, and says that in the record and proceedings had in the Court of Appeals of Kentucky in the above entitled action, which was brought in the Fulton Circuit Court for Fulton County, Kentucky, by the plaintiff in error against the defendant in error, and thence appealed to the Court of Appeals of Kentucky, there is manifest error in the orders, decision and judgment of the Court of Appeals of Kentucky in the following respects, to wit:

1. The said Court of Appeals of Kentucky erred to the prejudice of the plaintiff in error, Dahnke-Walker Milling Company, in adjudging that the contract made between the Dahnke-Walker Milling Company, plaintiff in error, and C. T. Bondurant, defendant in error, for the purchase of the wheat involved in this action, is or was a transaction in intrastate commerce, and that the plaintiff in error, in engaging in said transaction with defendant in error, had subjected itself to the provisions of Section 571, Kentucky Statutes, which prohibit a corporation organized under the laws of Kentucky or of any other State from carrying on any business in Kentucky without complying with the requirements of said Section 571, Kentucky Statutes, by designating its principal place of business in Kentucky and an agent thereat upon whom process could be served, and filing with the Secretary of State of Kentucky a statement designating such agent and principal place of business, and in holding that the contract between plaintiff in error and defendant in error for the purchase of the wheat involved in said contract was void and unenforceable as being a transaction in intrastate commerce, in violation of the provisions of said Section 571, Kentucky Statutes.

2. Said Court of Appeals of Kentucky erred to the prejudice of plaintiff in error, Dahnke-Walker Milling Company, in holding that the transaction between plaintiff in error and defendant in error for the purchase of the wheat involved in this action was not commerce between the States of Tennessee and Kentucky and therefore exempt by the commerce clause of the Federal Constitution from any burdens, restraints, limitations or conditions imposed or sought to be imposed thereon by the State of Kentucky, or from any regulation by the State of Kentucky, and particularly in refusing to hold that Section 571, Kentucky Statutes, in so far as it might be construed to extend or apply to the transaction between plaintiff in error and defendant in error involved in this action, was and is unconstitutional and void and in violation of the commerce clause of the Constitution of the United States as a void attempt by the State of Kentucky to

burden or to regulate commerce between the States of Kentucky and Tennessee.

3. Said Court of Appeals of Kentucky erred to the prejudice of plaintiff in error in upholding as valid the defense pleaded by defendant in error that plaintiff in error, in engaging in the transaction with defendant in error forming the basis of this action, had not complied with the provisions of Section 571, Kentucky Statutes, above referred to, the validity of which statute was drawn in question and denied by the plaintiff in error on the ground of its being repugnant to the Constitution of the United States of America, and said Court of Appeals erred in deciding that said statute was valid as applied to the contract or transaction forming the basis of this action,

and, applying said statute thereto, in holding that the contract
114 sued upon in this action was void and unenforceable notwithstanding plaintiff in error, in the Fulton Circuit Court and in the Court of Appeals of Kentucky, at all times specially set up and claimed that the transaction between it and defendant in error was and is a transaction in commerce between the States of Kentucky and Tennessee, and that under the Constitution of the United States it was and is beyond the power of the State of Kentucky to regulate or burden such commerce or by any statute of Kentucky to impose limitations or restrictions upon or to deny the validity of said contract between plaintiff in error and defendant in error; and the said Court of Appeals of Kentucky erred in denying the contention of plaintiff in error that said Section 571, Kentucky Statutes, above cited, was and is not valid when applied to the transaction between plaintiff in error and defendant in error involved in this action, and erred in holding that said Section 571, Kentucky Statutes, is valid as applied to said transaction notwithstanding the provisions of the Constitution of the United States and the rights specially set up and claimed herein by the plaintiff in error, both in the Fulton Circuit Court and in said Court of Appeals of Kentucky.

4. Said Court of Appeals of Kentucky erred to the prejudice of plaintiff in error in affirming the judgment of the Fulton Circuit Court which sustained the validity of Section 571, Kentucky Statutes, as a regulation of the transaction between plaintiff in error and defendant in error involved in this action, and as a regulation of commerce between the States of Kentucky and Tennessee, which judgment of the Court of Appeals of Kentucky is based upon an opinion delivered by it on October 17, 1919, adopting and adhering to a former opinion of said Court of Appeals of Kentucky delivered May 25, 1917, in the same action, upon an appeal to that court taken by C. T. Bondurant, now defendant in error, against Dahnke-Walker Milling Company, now plaintiff in error, from a former judgment rendered in said action by the Fulton Circuit Court, which
115 was reversed and annulled by the Court of Appeals of Kentucky upon said former appeal decided May 25, 1917.

JOSEPH E. ROBBINS,
JOHN C. DOOLAN,
Attorneys for Plaintiff in Error.

Filed Jan'y 8, 1920.

JOHN D. CARROLL, *Chief Justice.*

115½ [Endorsed:] Filed Jan. 8, 1920. Roy B. Speck, C. C. A.

116 On said date, to wit, January 8, 1920, there was filed in the office of the Clerk of the Court of Appeals a Petition for Writ of Error, which is hereto attached and is as follows:

117 *Petition for Writ of Error.*

The Supreme Court of the United States.

DAHNKE-WALKER MILLING COMPANY, Plaintiff in Error,

VS.

C. T. BONDURANT, Defendant in Error.

The plaintiff in error, Dahnke-Walker Milling Company, conceiving itself aggrieved by the orders made and the opinions delivered and the judgment rendered by the Court of Appeals of Kentucky upon the appeal of the plaintiff in error, taken by it against C. T. Bondurant, the defendant in error, (in an action of said plaintiff in error against said defendant in error), which judgment was entered by the Court of Appeals of Kentucky at its Fall Term, 1919, to wit on October 17, 1919, said court being the highest court of the State of Kentucky having jurisdiction of said action or in which it might be tried or reviewed, and which said judgment affirmed a judgment of the Circuit Court of Fulton County, Kentucky, which dismissed an action brought in that court by the plaintiff in error against the defendant in error to recover more than \$2,000.00 claimed as damages for breach of contract,—presents herewith its assignment of errors and prays for a writ of error to issue out of said Supreme Court of the United States to the said Court of Appeals of Kentucky and the Judges thereof, to the end that the record in said matter and action may be removed to the Supreme Court of the United States and the errors complained of by your petitioner may be examined and corrected, and said judgment of the Court of Appeals of Kentucky be reviewed and reversed.

JOSEPH E. ROBBINS,
JOHN C. DOOLAN,
Attorneys for Petitioner.

118 The Supreme Court of the United States.

DAHNKE-WALKER MILLING COMPANY, Plaintiff in Error,

VS.

C. T. BONDURANT, Defendant in Error.

Desiring to give the petitioner, Dahnke-Walker Milling Company an opportunity to test in the Supreme Court of the United States the questions presented in its petition for a writ of error and in its assignment of errors by which said petition is accompanied, it is ordered that a writ of error from the Supreme Court of the United States to

the Court of Appeals of Kentucky in the above styled action be, and the same is hereby, allowed, and it is ordered that same be made a supersedeas, and the bond in the penal sum of \$500.00 herewith presented is approved.

In testimony whereof, I have hereunto set my hand this 8th day of January, 1920.

JOHN D. CARROLL,
*Chief Justice and Presiding Judge of
the Court of Appeals of Kentucky.*

118½ [Endorsed:] Filed Jan. 8, 1920. Roy B. Speck, C. C. A.

119 On said date, to wit, January 8, 1920, there was filed in the office of the Clerk of the Court of Appeals a Writ of Error from the Supreme Court of the United States and an order allowing same by the Chief Justice of the Court of Appeals of Kentucky and which is attached hereto and is as follows:

120 UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

THE UNITED STATES OF AMERICA:

The President of the United States of America to the Court of Appeals of Kentucky and to the Judges thereof Greeting:

Because, in the record and proceedings as also in the rendition by the Court of Appeals of Kentucky, at its Fall Term, 1919, to wit on October 17, 1919 (said Court of Appeals of Kentucky being the highest court of law or equity of said State in which a decision could be had), of a judgment in a certain action between Dahnke-Walker Milling Company, Appellant (now Plaintiff in Error), and C. T. Bondurant, Appellee (now Defendant in Error), wherein was drawn in question the validity of a statute or Constitution or of an authority exercised under the said State of Kentucky, on the ground of its being repugnant to the Constitution or laws of the United States, and the decision was in favor of such validity, or wherein was brought in question the construction of a clause of the Constitution of the United States, and the decision was against the right, title, privilege or exemption specially set up or claimed by said plaintiff in error under such clause of the said Constitution, a manifest error hath happened, to the great damage of the said Dahnke-Walker Milling Company, as by its complaint appears, we, being willing that error, if any hath been made, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid

121 being inspected, the said Supreme Court may cause further to be done, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this eighth day of January, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and forty-fourth.

[Seal Eastern Kty. Dist. Court, United States of America.]

J. W. MENZIES,
Clerk of the United States District Court
for the Eastern District of Kentucky,
By CHAS. N. WIARD, D. C.

Allowed by

JOHN D. CARROLL,
Chief Justice and Presiding Judge of
the Court of Appeals of Ky.

121½ [Endorsed:] Filed Jan. 8, 1920. Roy B. Speck, C. C. A.

122 And on said date, to wit, January 8, 1920, there was filed in the office of the Clerk of the Court of Appeals a Writ of error Bond and which is attached hereto and is as follows:

123 *Bond.*

The Supreme Court of the United States.

DAHNKE-WALKER MILLING COMPANY, Plaintiff in Error,

vs.

C. T. BONDURANT, Defendant in Error.

Know all men by these presents, that the Dahnke-Walker Milling Company, principal, and John C. Doolan, surety, are held and firmly bound unto the above named C. T. Bondurant in the sum of Five Hundred Dollars (\$500.00), to be paid to the obligee herein, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our successors, heirs, executors and administrators, firmly by these presents:

Sealed with our seals and dated the 8th day of January, 1920.

Whereas, the above named Dahnke-Walker Milling Company has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of Kentucky,

Now, therefore, the condition of this obligation is such that if the above named Dahnke-Walker Milling Company shall prosecute its said writ of error to effect and if it shall make good its plea and answer the whole amount of the judgment herein, including the just

damage for delay, and all costs and interest, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

DAHNIKE-WALKER MILLING COMPANY,
By JOHN C. DOOLAN, *Attorney.*
JOHN C. DOOLAN, *Surety.*

Sealed and delivered in the presence of and approved by me this 8th day of January, 1920.

JOHN D. CARROLL,
*Chief Justice and Presiding Judge of
the Court of Appeals of Kentucky.*

[Endorsed:] Filed Jan. 8, 1920. Roy B. Speck, C. C. A.

124 And afterwards, to wit, on the 20th day of January, 1920,
there was filed in the office of the Clerk of the Court of Appeals the original Citation, which is hereto attached and is as follows:

125 *Citation on Writ of Error.*

The Supreme Court of the United States.

DAHNIKE-WALKER MILLING COMPANY, Plaintiff in Error, v

vs.

C. T. BONDURANT, Defendant in Error.

United States of America to C. T. Bondurant, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington within thirty days from date hereof, pursuant to a writ of error allowed in the above styled action, wherein Dahnke-Walker Milling Company *if* plaintiff in error, and C. T. Bondurant is defendant in error, upon a petition for writ of error filed with and allowed by Honorable John D. Carroll, Chief Justice and Presiding Judge of the Court of Appeals of Kentucky, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this eighth day of January in the year of our Lord One Thousand Nine Hundred and Twenty.

JOHN D. CARROLL,
*Chief Justice and Presiding Judge
of the Court of Appeals of Kentucky.*

Executed Jan. 15, 1920, by serving a true copy of this Citation of Writ of Error on C. T. Bondurant.

SWAYNE WALKER,
Sheriff of Fulton Co.

[Endorsed:] Filed Jan. 20, 1920. Roy B. Speck, C. C. A.

126 COMMONWEALTH OF KENTUCKY:
 Court of Appeals, act:

In obedience to the commands of the attached Writ of Error, I hereby transmit to the Supreme Court of the United States, a complete transcript of the entire record in the case of Dahnke-Walker Milling Company v. C. T. Bondurant with all things touching the same, as appears from the record and files of my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office. Done at the Capitol, in Frankfort, Kentucky, on this the 20th of January, 1920.

[Seal Kentucky Court of Appeals.]

ROY B. SPECK,
Clerk of the Court of Appeals of Kentucky.

Fee for this transcript, \$32.00.

Endorsed on cover: File No. 27,454. Kentucky Court of Appeals, Term No. 699. Dahnke-Walker Milling Company, plaintiff in error, vs. C. T. Bondurant. Filed January 31, 1920. File No. 27,454.

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SUPREME COURT OF THE UNITED STATES

DAHNIKE-WALKER MILLING COMPANY,

Plaintiff in Error,

vs.

C. T. BONDURANT, - - - *Defendant in Error.*

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

May it Please the Court:

The journal of this Court on June 6, 1921, shows the following entry:

“This case restored to the docket for reargument before a full bench, and the attention of counsel called to the question of the jurisdiction of this Court.”

The question of jurisdiction, of course, lies at the threshold of this hearing. It was not raised by counsel for defendant in error, and therefore the basis of jurisdiction, though stated at page 2 of our original brief, was not discussed in the brief. When the case was heard on March 18, 1921, the Court suggested this

All italics in this brief are ours unless otherwise stated.

question, and, having previously prepared upon it, we then maintained that a writ of error, and not *certiorari*, is the proper method of bringing this case up for review, citing—

Kenney v. Supreme Lodge, 252 U. S. 411-416.

Jett Bros. v. Carrollton, 252 U. S. 1-6.

Baltimore, &c., R. R. Co. v. Hopkins, 130 U. S. 210.

And other cases.

In obedience to the Court's suggestion, we shall herein elaborate our contention as to the propriety of the writ of error in this case.

We shall also supplement our discussion of the case on its *merits* by citing a recent decision of the Circuit Court of Appeals for the Eighth Circuit, in the case of *Farmer's Grain Co. v. Langer, Att'y Gen.*, 273 Fed. 637, reported in the Advance Sheets, September 1, 1921.

QUESTION OF JURISDICTION.

Jurisdiction, of course, is regulated by the Act of September 6, 1916, Chap. 448, 39 Stat. 726, amending Sec. 237, Judicial Code.

ANALYSIS OF SECTION 237, JUDICIAL CODE, AS AMENDED BY ACT SEPTEMBER 6, 1916.

The statute thus amended deals with these two classes of cases brought to this Court from the highest court of a State:

1. Cases reviewable upon writ of error, namely:

- (a) Cases which draw in question the validity of a treaty or statute of or an authority exercised under the United States, where the decision is *against* their validity.
- (b) Cases which draw in question the validity of a statute of or an authority exercised under any State, on the ground of repugnancy to the Constitution, treaty or laws of the United States, where the decision is *in favor* of the validity of the State statute.

2. Cases reviewable on *certiorari*, namely:

- (a) Cases which draw in question the validity of a treaty or statute of or authority exercised under the United States, where the decision of the State court is *in favor* of their validity.
- (b) Cases which draw in question the validity of a statute of or authority exercised under a State, on the ground of repugnancy to the Constitution, treaty or laws of the United States, where the decision of the State court is *against* their validity.
- (c) Cases in which a title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, where the decision of the State court is *either in favor of or against* such title, right, privilege or immunity especially set up and claimed by *either* party.

Since the amendment of September 6, 1916, many lawyers, assuming it to be vague or uncertain in its terms, have adopted the practice of resorting to both

certiorari and the writ of error to bring a case to this Court from a State Court.

This seems to us exceedingly bad practice and seldom justified. It has the effect of burdening the Court with twice considering the case—first, upon application for *certiorari*, and then upon writ of error.

We have deemed it our duty to carefully analyze the statute, and, in the exercise of our best judgment, to select that remedy which seems to be pointed out by the law itself and sanctioned by the decisions of this Court.

The instant case, we submit, clearly falls under class (b) *supra* of "Cases reviewable upon writ of error."

It involves a direct attack upon the power of Kentucky, by statute, to impose restrictions upon a transaction in interstate commerce between the Milling Company and Bondurant.

TERMS OF STATUTE ATTACKED AS VOID.

Section 571, Kentucky Statutes, *by its terms*, applies to all corporations (whether domestic or foreign) that are engaged in "doing business" in Kentucky, whether that business be *intrastate* or *interstate* commerce. It was applied *in this case*, in its broadest conception, to *interstate* commerce, though in previous decisions the Kentucky Court had held the statute void as to *interstate* commerce because repugnant to the Commerce Clause.

NATURE OF THIS CASE.

Observe that this is not a case of *construction* of a statute. It is simply a case of refusing to hold it void, when by its terms it is plainly repugnant to the Commerce Clause. In this case the Kentucky Court refused to do what it had done in other cases. It also *misconstrued* the Commerce Clause in attempting to gloss over a statute repugnant to it.

Louisville Trust Co. v. Bayer, 166 Ky. 749.
Bondurant v. Milling Co., 175 Ky. 774-776.

The Milling Company sues Bondurant upon a contract which he claims to be illegal and unenforceable under Section 571, Kentucky Statutes.

This statute was directly attacked by the Milling Company as void, if or when applied to the transaction in question, on the ground that, *so applied*, the statute is *repugnant* to the Commerce Clause. See Milling Company's reply (Rec., p. 9), and motion for new trial (Rec., p. 18); also opinion of the Kentucky Court, 175 Ky. 774-777. (Appendix to original brief.)

The statute assailed has in this identical case been *so construed* and *applied* by the Kentucky Court of Appeals as to render void the particular transaction between the parties in this case. If the transaction be in point of fact a part of *interstate* commerce, as elsewhere shown, it does not change the effect of the Kentucky Court's *decision* for that Court to erroneously describe the transaction as *intrastate* com-

merce, or to say, *as it does* in its opinion, that if it thought the transaction were *interstate* commerce, the statute assailed would have to be held *void* as repugnant to the Commerce Clause of the Federal Constitution.

Bondurant v. Milling Co., 175 Ky. 774-776.
 Corn Products Co. v. Eddy, 249 U. S. 427.

**CONSTRUCTION OF SECTION 237, JUDICIAL CODE, AS AMENDED
 BY ACT SEPTEMBER 6, 1916.**

We have already analyzed this section, *ante*, page 3. Quotation in full is unnecessary.

The key to the construction of this law is found in the words "drawn in question." If the case "draws in question" the validity of a State law, on the ground of its repugnancy to the Constitution of the United States, and the State Court has decided this question *in favor of* the validity of the State statute, such a case can be reviewed by this Court *only upon writ of error*.

**HOW IS THE VALIDITY OF A STATE LAW "DRAWN IN
 QUESTION"?**

No particular method is prescribed. No particular pleading is required. The question may be raised in argument merely, or even by petition for rehearing, if the Court actually takes notice of the petition to the extent of passing upon the validity of the stat-

ute. It is sufficient that an attack *was made* upon the validity of the State statute and the *decision* of the State Court was *in favor* of its validity.

The question may arise upon a statute of the State, prescribing merely a rule of evidence or upon objections to instructions based upon a State statute.

McGinis v. California, 247 U. S. 91.

Same v. Same, 247 U. S. 95.

Y. & M. V. R. R. Co. v. Mullins, 249 U. S. 531.

N. O. & N. E. R. R. Co. v. Scarlet, 249 U. S. 528.

WHEN IS THE VALIDITY OF A STATE LAW "DRAWN IN QUESTION"?

Passing by the earlier cases, this question is most clearly answered in *Baltimore & Potomac R. R. Co. v. Hopkins*, 130 U. S. 210-224, where the Court, speaking through Chief Justice Fuller, said:

"Whenever the *power to enact* a statute as it is by its terms, or is *made to read by construction*, is fairly open to denial and *denied*, the validity of such statute is drawn in question, but not otherwise."

See, also:

U. S. v. Lynch, 137 U. S. 280-285.

McLean v. Railroad Co., 203 U. S. 38-47.

This succinct definition has been many times restated by this Court, or adopted without restatement, in later cases.

In *Jett Bros. Co. v. Carrollton*, 252 U. S. 1-6, Justice Day, in demonstrating that *certiorari* was the

proper writ in *that* case, clearly stated the principles of law, which show that a writ of error is proper in *this* case.

The opinion contains the following language (p. 6):

“Drawing in question the validity of a statute or authority as the basis of appellate review has long been a subject of regulation in statutes of the United States, as we had occasion to point out in *Champion Lumber Co. v. Fisher*, 227 U. S. 445, 450, 451. What is meant by the validity of a statute or authority was discussed by this Court in *Baltimore & Potomac R. R. Co. v. Hopkins*, 130 U. S. 210, in which this Court, speaking by Mr. Chief Justice Fuller said: ‘Whenever the power to enact a statute *as it is* by its terms, *or is made to read by construction*, is fairly open to denial and *denied*, the validity of such statute is drawn in question, but not otherwise.’ And the Chief Justice added upon the authority of *Millingar v. Hartupee*, 6 Wall. 258, 261, 262, that the word ‘authority’ stands upon the same footing.

“In order to give this Court jurisdiction by writ of error under amended Section 237, Judicial Code, it is the *validity* of the statute or authority which must be drawn in question. The mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis of a writ of error from this Court. There must be a *substantial challenge* of the validity of the statute or authority upon a claim that it is repugnant to the Federal Constitution, treaties or laws so as to require the State Court to decide the question of validity in disposing of the contention. *Champion Lumber Co. v. Fisher*, *supra*, and cases cited.”

CASES OF JURISDICTION FOUNDED ON WRIT OF ERROR.

Of course, we shall cite only a few of these cases.

Merchants National Bank v. Richmond, decided June 6, 1921. (Not yet officially reported) 41 Sup. Ct. Rep. 619; Adv. Ops., p. 717. Opinion by Justice Pitney.

The State of Virginia passed a law taxing shares in national banks at a higher rate than other "moneyed capital" in the State was taxed.

The Merchants National Bank of Richmond contested this tax on the ground that the statute authorizing the higher rate "contravened" the National Banking Act, Sec. 5219, Rev. Stat. (122 Va. 522).

The Virginia Court upheld the tax. In doing so, it misconstrued Sec. 5219 and held it *inapplicable* to "moneyed capital" other than banking capital (124 Va. 522; 98 S. E. 643), thus attempting to evade a conflict between the State statute and the Act of Congress.

The bank thereupon took a writ of error from this Court and also applied for a writ of *certiorari*.

This Court *denied* the *certiorari* but *took jurisdiction* under the writ of error, and reversed the judgment of the Virginia Court.

As a basis of its jurisdiction, this Court said:

"The opinion of the Court of last resort shows that plaintiff in error drew in question the validity of the ordinance and statute, as construed and applied, upon the ground of their alleged

repugnance to Section 5219, Rev. Stat. U. S. (Comp. Stat., Section 9784), and that the Court sustained their validity notwithstanding. Under Section 237, Judicial Code, as amended by Act of Sept. 6, 1916, c. 448, 39 Stat. 726 (Comp. St., Section 1214), a writ of error is the appropriate process for reviewing the final judgment in this Court, and the petition for allowance of a writ of certiorari will be denied."

Obviously, there is no difference in principle between the attempt of the *Virginia Court* to avoid a conflict between the State statute and the Act of Congress by misconstruing the Act of Congress, and the attempt of the *Kentucky Court* in this case to avoid a like conflict by misconstruing the Commerce Clause.

Missouri Pacific R. R. Co. v. Ault, decided June 1, 1921. (Not yet officially reported) 41 Sup. Ct. Rep. 593; Adv. Ops., p. 647. Opinion by Justice Brandeis.

Ault sued the Missouri Pacific R. R. Co. and the Director General of Railroads in the State Courts of Arkansas to recover a penalty claimed against the Director General under an Arkansas statute.

The Director General and the railroad company both attacked the validity of this Arkansas statute on the ground that it was repugnant to the Constitution and laws of the United States in so far as both of them were concerned.

The Supreme Court of Arkansas upheld the validity of the Arkansas statute and rendered judgment against the railroad company and the Director

General, and both of them brought the case to this Court by writ of error, and also made application for writ of *certiorari*.

This Court took jurisdiction under the writ of error and denied the application for *certiorari*, and in doing so used the following language:

"The company had claimed seasonably that under the acts of Congress it could not be held liable either for the wages or the penalty and that, if the State and Federal statutes should be construed as creating such liability, they were in that respect void as to it under the Federal Constitution. The Director General did not contest liability for wages actually due, but claimed that under the legislation of Congress he was not liable for the penalty and that the State statute as applied to him was void under the Federal Constitution. The claims of both defendants having been denied by the highest Court of the State, they brought the case here by writ of error."

In conclusion the Court said:

"The case is properly here on writ of error. The petition for writ of certiorari, consideration of which was postponed to the hearing on the merits, is therefore denied."

St. Louis & S. F. R'y Co. v. Public Service Commission, 254 U. S. 535, 537. Opinion by Justice McReynolds.

This case is quite in point, though the opinion contains no elaborate discussion of the governing principles.

The Public Service Commission of Missouri, claiming authority under a statute of that State, made an order requiring the railroad company to detour two of its through interstate passenger trains from its main line over a branch road for the benefit of the city of Caruthersville, which this court found to be already adequately served by local connecting trains.

The railroad company attacked the validity of this order and of the statute of the State, if construed to afford a basis for the order, on the ground that, *as construed* and *applied* or enforced, the statute was a burden upon and an interference with interstate commerce.

The Supreme Court of Missouri upheld the order of the Public Service Commission and sustained the validity of the law as applied to the particular case before it.

The railway company brought the case to this Court by writ of error, and this Court took jurisdiction solely upon writ of error and reversed the judgment of the Missouri Supreme Court, holding that the order made was an interference with interstate commerce and therefore void, and that it was immaterial "whether the interference be directly by the Legislature or by its command through the orders of an administrative body" (p. 536).

Kenney v. Supreme Lodge, 252 U. S. 411. Opinion by Justice Holmes.

Kenney had recovered a judgment against the Supreme Lodge in the State of Alabama. Thereafter he brought suit in the courts of Illinois upon his Alabama judgment.

The Supreme Lodge pleaded a statute of Illinois prohibiting the maintenance of the action in the courts of Illinois.

Kenney attacked the validity of this Illinois statute as repugnant to the Full Faith and Credit Clause of the Federal Constitution.

The Supreme Court of Illinois upheld the validity of the Illinois statute as against this attack by Kenney and dismissed Kenney's action.

Thereupon Kenney brought the case to this Court by writ of error and also petitioned for a *certiorari*.

In this Court counsel for the Supreme Lodge contended (see notes of their brief, p. 412) that the case could be reviewed by this Court only upon *certiorari* and not by writ of error, and that the application for *certiorari* was not made in time.

Notwithstanding this contention, this Court held that *error*, and *not certiorari*, was the *proper* method of bringing the case up for review.

The opinion concludes briefly with these words (p. 416):

“As the judgment below upheld a statute that was invalid *as construed*, the writ of error was

the proper proceeding and the writ of *certiorari* must be dismissed."

Pennsylvania R. R. Co. v. Public Service Commission, 250 U. S. 566. *Opinion by Justice Holmes.*

The Public Service Commission, against the protest of the Pennsylvania R. R. Co., undertook to enforce a Pennsylvania statute with reference to the rear car of a train operated by the railroad company in interstate commerce.

The railroad company attacked the validity of this statute on the ground that it violated the Commerce Clause of the Federal Constitution.

The highest Court of Pennsylvania having jurisdiction sustained the validity of the statute, and the railroad company by writ of error brought the case to this Court, which took jurisdiction and reversed the judgment of the Pennsylvania Court.

New Orleans & N. E. R. R. Co. v. Scarlet, 249 U. S. 528. *Opinion by Justice Brandeis.*

Scarlet sued the railroad company in the Mississippi courts, under the Federal Employers' Liability Act.

When the case came on for trial, Scarlet, in proof, relied upon a Mississippi statute known as the "*Prima Facie* Act" as relieving him from the burden of establishing negligence.

The validity of this Mississippi statute was attacked by the railroad company as repugnant to the Federal Employers' Liability Law.

In the Mississippi Court it was contended that the State statute was "not applicable," (See official statement of case in that Court, 115 Miss. 285, 76 Sou. 265-266), and in this Court the case is thus stated:

"Scarlet concedes now that the statute can not *constitutionally* be *applied* to suits under the Federal Employers' Liability Act, since this Court *has so decided* in New Orleans, etc., *R. Co. v. Harris*, 247 U. S. 367."

The Supreme Court of Mississippi sustained the validity of the State statute thus attacked and rendered judgment against the railroad company, which thereupon brought the case to this Court by writ of error.

The railroad company also petitioned for a *certiorari*.

This Court dismissed the petition for writ of *certiorari*, but took jurisdiction upon the writ of error and reversed the judgment. In doing so it used the following language with reference to these alternative writs (p. 530):

"The conflict of a State statute with a valid law of the United States being involved, and the decision having been in favor of the validity of the statute, the case is properly here on a writ of error, and the petition for a writ of *certiorari* is denied."

*Corn Products Refining Co. v. Eddy, 249 U. S. 427.
Opinion by Justice Pitney.*

The Corn Products Co. brought suit against Eddy and others, members of the State Board of Health of Kansas, to enjoin the enforcement of the Kansas Food and Drugs law and regulations made by the Board under its authority, and in their suit they averred "that the State law and the regulations referred to, particularly regulation 6, were void because in conflict with the interstate commerce clause" and the Federal Food and Drugs Act and also Section 1 of the Fourteenth Amendment.

The Supreme Court of Kansas upheld the validity of the Kansas statute and the regulations adopted.

The case came to this Court on writ of error, and this Court held (p. 431): (1) that there was no discrimination against the plaintiff, or denial of equal protection under the Fourteenth Amendment; (2) that, although the Supreme Court of Kansas in its opinion said nothing about interstate commerce, its silence upon that subject could not change the fact if the commerce was indeed interstate.

The Court said (p. 432):

"In cases of this kind we are concerned, not with the *characterization* or *construction* of the State law by the State Court, nor even with the question whether it has been in terms construed, but *solely with the effect* and operation of the law as put in force by the State."

This Court then proceeded to inquire, *for itself*, as to the repugnancy of the statute and regulations to the Commerce Clause and, finding that no such repugnancy existed, it affirmed the judgment.

There are numerous cases challenging the validity of State tax laws on the ground of their repugnance to the Federal Constitution, where this Court took jurisdiction by writs of error to review judgments of State courts sustaining the validity of the State statutes thus assailed.

Royster Guano Co. v. Virginia, 253 U. S. 412.

Opinion by Justice Pitney.

Wagner v. Covington, 251 U. S. 95. Opinion by Justice Pitney.

Union Tank Line Co. v. Wright, 249 U. S. 275.

Opinion by Justice McReynolds.

Union Pacific R. R. Co. v. Public Service Commission, 248 U. S. 67. Opinion by Justice Holmes.

Crew Levick Co. v. Pennsylvania, 245 U. S. 292.

Opinion by Justice Pitney.

Likewise this Court has taken jurisdiction by writ of error to review judgments of State courts sustaining the validity of orders of Public Utility Commissions requiring railroad companies to install sidetracks, where such orders were attacked by the railroad companies as repugnant to the Fourteenth Amendment and therefore void.

C. & N. W. R'y Co. v. Ochs, 249 U. S. 416.

Lake Erie, etc., R. R. Co. v. Public Utilities Commission, 249 U. S. 422. Opinions by Justice Vandevanter.

CASES OF JURISDICTION FOUNDED ON CERTIORARI.

We shall mention only a few of these cases for the purpose of showing how this Court has differentiated them from cases like the instant one.

Jett Bros. v. Carrollton, 252 U. S. 1.

In this case Jett Bros. Co. charged *discrimination* against it by the assessing officers in fixing the value of its property at 100 per cent when other property in the same taxing district was assessed at an average of not more than 40 per cent of its fair cash value. It charged that this *discrimination* was a denial of the equal protection of the laws.

No attack was made upon the *validity* of the statute under which the assessing officers proceeded. A belated *attempt* to make such an attack appeared in a petition for rehearing before the Kentucky Court of Appeals, but that petition was denied by the Kentucky Court without opinion. The case came to this Court as a case in which the State Court had simply denied a Federal right claimed under the Equal Protection Clause of the Fourteenth Amendment and had *not* in fact *ruled* upon the *validity* of the Kentucky statute, attacked for the first time in a petition for rehearing which was denied without opinion.

This Court held that the attempt to raise a question as to the *validity* of the statute came too late when presented for the first time in the petition for

rehearing, and therefore the validity of the statute had not been drawn in question in a manner which required the State Court to pass upon it; hence the action of the State Court could be reviewed, not by writ of error, but only by *certiorari*. Accordingly the writ of error was dismissed in a luminous opinion by Justice Day, cited at page 8, *ante*.

Godchaux Co. v. Estopinal, 251 U. S. 179. Opinion by Justice McReynolds.

In this case a writ of error was dismissed, the Court holding that it could only acquire jurisdiction upon *certiorari*. The basis of this decision is thus stated in the opinion (pp. 180-181):

"The record fails to disclose that plaintiff in error at any time or in any way *challenged* the *validity* of the State constitutional amendment because of conflict with the Federal Constitution until it applied for a rehearing in the Supreme Court. That application was refused without more. Here the sole error assigned is predicated upon such supposed conflict; and unless *that point* was *properly* raised below, a writ of error can not bring the cause before us; * * *

"The settled rule is that in order to give us jurisdiction to review the judgment of a State Court upon writ of error, the *essential* Federal question must have been especially set up there at the proper time and in the proper manner; and, further, that if *first* presented in a petition for rehearing, *it comes too late* unless the Court *actually* entertains the petition and *passes* upon the point." (Citing authorities.)

Mergenthaler Linotype Co. v. Davis, Etc., 251 U. S. 256. Opinion by Justice McReynolds.

This case came to this Court upon writ of error, dismissal of which was asked on the ground that in the court below there was not drawn in question the validity of a statute of the State because of its being repugnant to the Federal Constitution or laws.

The opinion contains the following language, giving the basis of this Court's decision (p. 258):

"The only ground mentioned in the assignments of error upon which this writ could be sustained is conflict between specified sections of the Missouri statutes relating to transactions by foreign corporations and the Federal Constitution. *But this point came too late, being first advanced below on the motion for rehearing.*"

The Court adds (p. 259):

"The claim that the lease contract was made in course of interstate commerce and therefore not subject to State statutes was insufficient to challenge the validity of the latter; at most it but asserted a 'title, right, privilege or immunity' under the Federal Constitution which might afford basis for *certiorari*, but constitutes no ground for writ of error from this Court."

In view of the language last above quoted, we have looked to the opinions delivered by the Missouri Supreme Court (271 Mo. 475) and the Springfield (Mo.) Court of Appeals (182 Mo. App. 113, 168 S. W. 239—first appeal; 181 S. W. 1183—second appeal) in order to see just what questions were presented in the State courts.

There is not in any one of these three opinions the slightest intimation that the Linotype Company at any time or in any way challenged the *validity* of the Missouri statute which had been pleaded by Hays in defense of the action against him. The storm center of the contention was the claim by the Linotype Company that it was *not* "doing business" in Missouri, and the opinion of the Supreme Court shows that this contention was resolved against the Linotype Company on the facts before it, *regardless* of whether the business done was *interstate* or *intrastate* commerce.

The question actually decided by the Missouri Courts is thus somewhat similar to the question decided by this Court in *International Harvester Co. v. Kentucky*, 234 U. S. 579, or that decided by the Kentucky Court of Appeals in *Three States Buggy Co. v. Kentucky*, 105 S. W. 971, both of which are radically different from the instant case.

In no one of these three opinions does it appear that the Linotype Company attacked the Missouri statute as *void*, because repugnant to the Commerce Clause of the Federal Constitution, if so construed as to apply to the particular transaction. Apparently no attempt was made to bring this contention into the case until after the final decision in the Missouri courts, when a *belated effort* was made to bring it in by petition for rehearing, which, as shown by the opinion of this Court, came entirely too late.

Therefore, the whole case turned in the Missouri courts upon the *construction* of the Missouri statute,

and *not upon its validity*. Certainly the power of the State of Missouri to enact a statute applicable to the transaction in suit was not challenged by the Linotype Company or considered in any of the opinions in the Missouri courts.

The instant case presents a very different situation. Not only does the Milling Company's reply distinctly state (printed Record, p. 9) that Section 571, Kentucky Statutes, is unconstitutional and void, but its motion for a new trial attacks the instruction which the Court based upon the void Kentucky statute.

Moreover, the opinion of the Court of Appeals shows that the discussion in that Court raged about the proposition that Section 571, Kentucky Statutes, *is void as applied to this particular transaction* between the milling company and Bondurant, because repugnant to the Commerce Clause, and the Court of Appeals said that if it thought the transaction was a part of interstate commerce, it would so hold, but it held the statute valid as applied to this particular transaction because it erroneously thought the transaction was intrastate commerce.

We are not concerned with the *reasoning* of the Court of Appeals, whether fallacious or sound, but we are vitally concerned with its *decision*. By its decision it has construed Section 571, Kentucky Statutes, to be valid, *as applied to this identical transaction*, denying the claim of the milling company that, when so applied, Section 571 is repugnant to the

Commerce Clause of the Federal Constitution and therefore void.

Corn Products Co. v. Eddy, 249 U. S. 427.

Southern Pacific Co. v. Industrial Accident Commission, 251 U. S. 259. *Opinion by Justice McReynolds.*

In this case jurisdiction was acquired by writ of *certiorari*. The only discussion of the subject appears in the notes of the brief of counsel for petitioner. It is there shown (and the statement is unchallenged) that "the *validity* of the State law was not drawn in question, but *was conceded*."

The opinion deals solely with the merits of the case, passing by the question of jurisdiction with the simple statement: "The cause is properly here by writ of *certiorari*."

The instant case is widely different because the facts with reference to the transaction are fully pleaded, and the power of the State of Kentucky to enact Section 571, so far as it applies to this transaction in interstate commerce, is *distinctly denied* in the *argument* as well as in the *pleadings*.

Philadelphia, etc., Coal & Iron Co. v. Gilbert, 245 U. S. 162. *Opinion by Justice Vandevanter.*

In this case a resident of New York sued in the courts of that State a Pennsylvania corporation to recover for an injury sustained by the plaintiff in

the defendant's coal mine in Pennsylvania. Service of process in New York was had upon a designated agent of the defendant.

Defendant claimed that the service was void, in that it could not be summoned in New York, except upon causes of action arising from its business transacted in that State, and that an attempt *by the Court* to compel it to respond to the suit in New York would be an invasion of its rights under the Fourteenth Amendment.

The New York courts decided against the defendant, which thereupon brought the case to this Court by writ of error. A motion to dismiss the writ of error was sustained by the Court on the ground that the defendant *had not questioned* in the Court below the *validity* of any statute of the State because of its repugnancy to the Constitution of the United States. Defendant had *merely* questioned the validity of the *service* of process and the *power of the Court* to proceed to a hearing consistently with the Due Process Clause of the Federal Constitution.

This Court said (p. 166) :

“Challenging the power of the Court to proceed to a decision of the merits did not draw in question an authority exercised under the State, for, as this Court has said, the power to hear and determine cases is not the kind of authority to which the statute refers.”

Coon v. Kennedy, 248 U. S. 457. *Memorandum opinion by Justice McReynolds.*

To ascertain the facts in this case it is necessary to refer to the report of the case in the New Jersey Court, 91 N. J. L. 598, 103 Atl. 207. It there appears that the case involved purely the question of *construing* an Act of Congress. The plaintiff contended it was retrospective in its effect, but the Court held it was merely prospective in its operation.

This Court succinctly states that the case did not involve an attack upon the validity of any Act of Congress nor an attack upon the validity of any State statute, hence there was no right to review by writ of error.

Ireland v. Woods, etc., 246 U. S. 323. *Opinion by Justice McKenna.*

In this case a writ of error was dismissed because, as stated by the Court, the case did not draw in question the validity of a State statute on the ground of its repugnancy to the Constitution, but involved merely its construction.

The Court said (p. 330):

“There is a difference between a question of *power to pass* a law and *its construction*, and a difference between the endowing of an officer with authority and his erroneous exercise of that authority. As was said by Chief Justice Fuller, speaking for the Court in *United States v. Lynch*, 137 U. S. 280, 285: ‘The validity of a statute is not drawn in question every time rights

claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed.' "

JURISDICTION FOUNDED UPON CLAIM OF TITLE, RIGHT, PRIVILEGE OR IMMUNITY UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES.

A discussion under this head is important to determine if this case could have been properly brought to this Court by *certiorari*; otherwise, the proper method of review is unquestionably by writ of error.

The only possible basis for jurisdiction on *certiorari* is subhead (c), *ante*, page 3, which includes cases where a *title, right, privilege or immunity* is claimed under the Constitution or a treaty or statute of the United States.

Clearly, this is not a case where the Milling Company asserts any "privilege" or "immunity" guaranteed to it under the Federal Constitution.

In the first place, this Court has held that foreign corporations are not "citizens" within the meaning of and are not protected by the privileges and immunities clause as contained either in Article IV, Section 2, of the Constitution, or by Section 1 of the Fourteenth Amendment.

Paul v. Virginia, 8 Wall. 168.

Blake v. McClung, 172 U. S. 239-248-259.

Orient Ins. Co. v. Daggs, 172 U. S. 557-561.

In the second place, the privileges and immunities secured by Article IV, Section 1, of the Constitution,

are only such privileges and immunities as are extended by the State to its own citizens.

Orient Insurance Co. v. Daggs, 172 U. S. 557-561.

Examination of Section 571, Kentucky Statutes, shows that it applies to domestic as well as foreign corporations; so that it can not be contended, and it was not in fact contended in the Kentucky Courts, that the Kentucky statute denied to the Milling Company any privileges or immunities extended to Kentucky corporations.

Furthermore, Article IV, Section 2, of the Constitution was intended to prevent discrimination against *citizens* of other States only in respect of the fundamental privileges of *citizenship*.

Maxwell v. Bugbee, 250 U. S. 525-537.

Opinion by Justice Day.

Maxwell v. Dow, 176 U. S. 581-592.

It therefore does not apply to the instant case.

Moreover, this Court has repeatedly held the Fourteenth Amendment only secures those privileges and immunities belonging to citizens of the United States *as such*, which derive their existence from the Federal Government.

Ownbey v. Morgan (April 11, 1921), 41 Sup. Ct. Rep. 433.

Slaughter House Cases, 16 Wall. 36.

Rosenthal v. New York, 226 U. S. 260.

There is not the slightest suggestion in this record that the Milling Company has asserted any claim based upon the Fourteenth Amendment. Its specific claim is based upon the Commerce Clause.

It only remains to inquire if the Milling Company has asserted any *title* or *right* of Federal origin.

Certainly it has asserted no such *title*, nor has it asserted any right or any exemption in the form of a property right, such as this Court was called upon to consider in *Ward v. Love County*, 253 U. S. 17-22 (Opinion by Justice Vandevanter).

The Commerce Clause of the Federal Constitution does not *per se* create a right in the Milling Company. It merely confers upon Congress the *exclusive* power to regulate commerce between the States, thereby denying the power of Kentucky to do so, and invalidating any statute of Kentucky which attempts a regulation of commerce.

The contention made by the Milling Company in this case is that, under the Commerce Clause, the State of Kentucky had *no power* to pass a statute like Section 571 and make it apply to the transaction involved in this case.

Hence, we maintain that this case does not present a claim of *title*, *right*, *privilege* or *immunity* under the Constitution, treaties or statutes of the United States, such as must be reviewed, if at all, in this Court, by writ of *certiorari*.

This eliminates the last possibility of maintaining jurisdiction by *certiorari*, if that method had been

adopted for bringing the case to this Court, and leaves the writ of error as the only proper method for review.

Even if the Milling Company had set up a claim under the Privileges and Immunities Clauses, its assertion of such claim necessarily denies or "draws in question" the validity of the State statute, so that in any event a writ of error would be *a* proper method of review, if not the *only* proper method.

ADDENDA TO ORIGINAL BRIEF.

Since this case was argued in March, 1921, the Circuit Court of Appeals for the Eighth Circuit has decided that the purchase of grain in one State for shipment into another State, is essentially a part of interstate commerce:

Farmers Grain Co., &c., v. Langer, Att'y Gen. of North Dakota, &c., 273 Fed. 635.

This case involved the validity of a statute of North Dakota, regulating the inspection, grading and weighing of grain. The statute was attacked by the grain company as void because imposing a burden upon interstate commerce and, further, because in conflict with the Grain Inspection Law enacted by Congress.

The Attorney General of North Dakota contended that the statute was merely a regulation of intrastate commerce; that the grain to which it applied was grain purchased within the State of North Dakota and stored in elevators in that State.

The grain company contended and proved that 90 per cent of the entire grain production of North Dakota was sold and shipped in interstate commerce; that while the grain company bought grain from its members and that part of the transaction ended with the purchase and delivery of the grain, the object of such purchase was shipment to market in other States.

The Circuit Court of Appeals held, upon a full citation of authority from this Court, that this was essentially a part of interstate commerce, citing numerous cases referred to in our original brief.

The question for decision is thus stated, at page 647:

"If the purchase of grain as detailed in the evidence is a part of the unit of interstate commerce in that grain, it necessarily follows that said Chapter 138 does impose a burden on that commerce."

Accordingly, the Court held the State law to be invalid to the extent that it interfered with or burdened interstate commerce in grain bought with the view and for the purpose of shipment in the current of commerce between States.

In this connection, the Circuit Court of Appeals cites *U. S. v. Reading Co.*, 226 U. S. 324, where this Court, speaking through Justice Lurton, said (pp. 367-368):

"That the defendants were *free to sell again* within Pennsylvania, or transport and sell beyond the State, is true. That some of the coal was *intended for local* consumption may also be true. But the *general market* contemplated was the market at tide-water, and the sales were made upon the basis of the average price at tide-water. The mere fact that the sales and deliveries *took place* in Pennsylvania is *not controlling* when, as here, the *expectation* was that the coal would, for the most part, fall into and become a part of the well-known current of commerce between the mines and the general consuming markets of

other States. 'Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.' "

CONCLUSION.

We ask the indulgence of the Court for so greatly prolonging our discussion by briefs, but the case has been of absorbing interest to us. The Court having manifested its interest, this must be our apology for again reiterating our conviction that we are entitled to have this Court take jurisdiction and reverse the judgment of the Kentucky Court of Appeals.

Respectfully submitted,

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FEB 9 1921

JAMES D. NAHER,

CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No.  30

DAHNKE-WALKER MILLING COMPANY,
Plaintiff in Error,

VERSUS

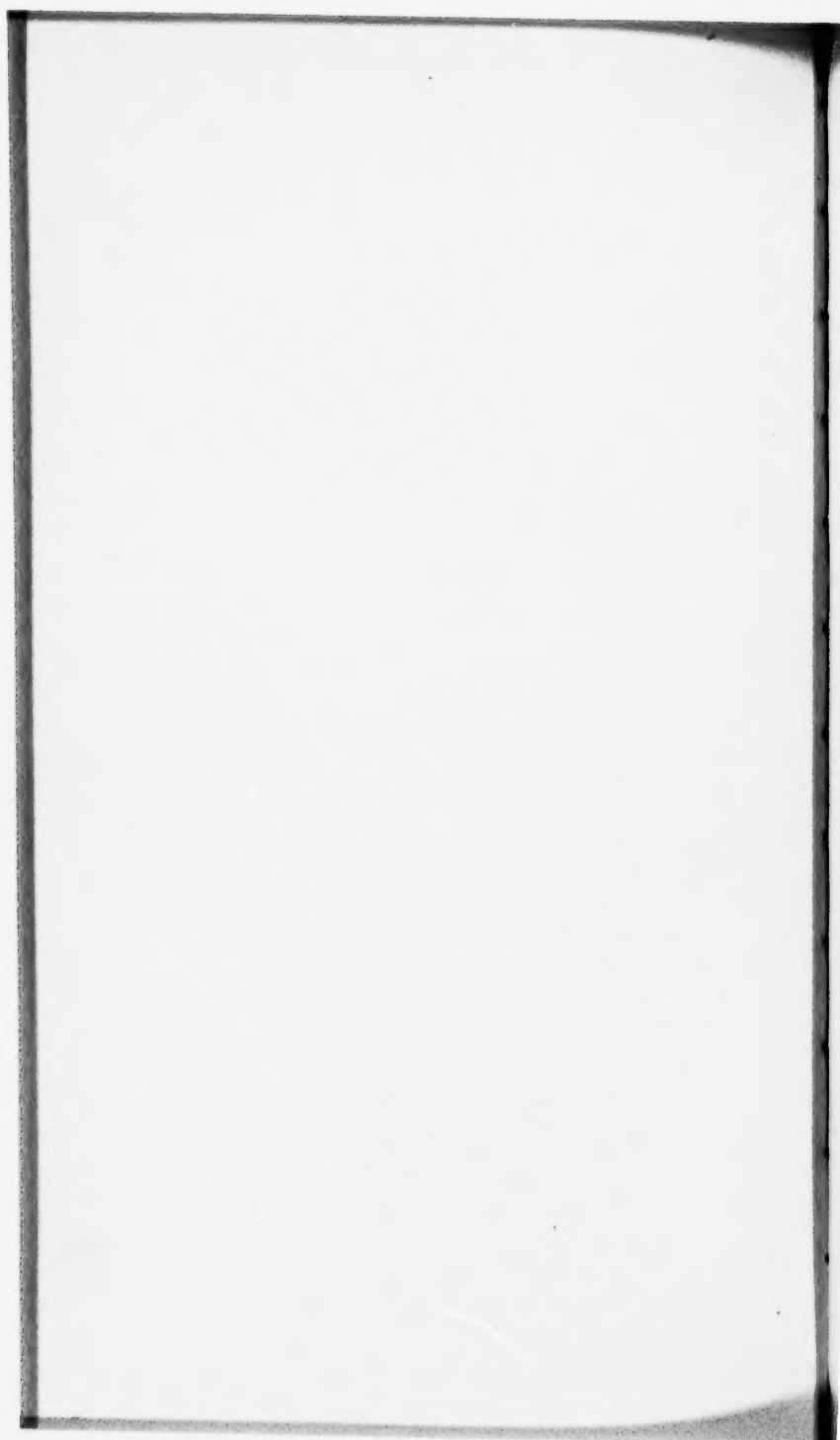
C. T. BONDURANT, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

In Error to the Court of Appeals of Kentucky.

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SUPREME COURT OF THE UNITED STATES

No. 235, October Term, 1920.

DAHNIKE-WALKER MILLING

COMPANY, - - - - - *Plaintiff in Error,*

versus

C. T. BONDURANT, - - - - - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

May it please the Court:

This is a proceeding by writ of error to review a judgment of the Kentucky Court of Appeals which sustained the Fulton Circuit Court in dismissing an action brought by the plaintiff in error, Dahnke-Walker Milling Company, a Tennessee corporation, against the defendant in error, C. T. Bondurant, a resident of Kentucky, to recover damages resulting from the latter's breach of his contract to sell the former about 14,000 bushels of wheat.

We shall hereafter refer to plaintiff in error as the "Milling Company," and to the defendant in error as the "defendant."

The judgment here complained of was based upon the failure of the Milling Company to comply with a Kentucky statute which forbids corporations "to

carry on any business" in Kentucky without first complying with certain requirements of the statute.

The Milling Company maintained in the State Court, and it maintains here, that the Kentucky Statute, as construed and applied in this case by the State Court, is unconstitutional under the Commerce Clause of the Federal Constitution, and a void attempt by the State of Kentucky to regulate commerce between the States of Kentucky and Tennessee.

References herein made to the record mean the *printed* record.

All italics are ours, unless otherwise shown.

QUESTION FOR DECISION.

The sole question for decision by this Court is whether the contract sued on is a part of *interstate* commerce or purely a transaction in *intrastate* commerce.

If this Court should conclude that the contract is *any part* of interstate commerce, the judgment of the Kentucky Court of Appeals must be reversed; otherwise, it should be affirmed.

STATUTE ASSAILED.

The statute invoked by defendant and construed by the State Courts to render the contract in this case void and unenforceable, is Section 571, Kentucky Statutes, which provides as follows (material portion italicized):

"All corporations except foreign insurance companies formed under the laws of this or any other State, and carrying on any business in this State, shall at all times have one or more known places of business in this State, and an authorized agent or agents thereat, upon whom process can be served; and *it shall not be lawful for any corporation to carry on any business in this State until it shall have filed in the office of the Secretary of State a statement*, signed by its president or secretary, giving the location of its office or offices in this State, and the name or names of its agent or agents thereat upon whom process can be served; and when any change is made in the location of its office or offices, or in its agent or agents, it shall at once file with the Secretary of State a statement of such change; and the former agent shall remain agent for the purpose of service until statement of appointment of the new agent is filed; and if any corporation fails to comply with the requirements of this section, such corporation, and any agent or employe of such corporation, who shall transact, carry on or conduct any business in this State, for it, shall be severally guilty of a misdemeanor, and fined not less than one hundred nor more than one thousand dollars for each offense."

OUTLINE OF CASE.

The Milling Company is a Tennessee corporation operating a flour mill at Union City, Tennessee. The defendant is the owner of a large farm in Fulton County, Kentucky.

In the month of June, 1915, the Milling Company contracted with the defendant to purchase all the wheat grown on his farm in the year 1915, estimated

at 14,000 bushels, at \$1.04 per bushel, delivered free on board cars of the Nashville, Chattanooga & St. Louis Railway Company at Hickman, Kentucky.

As this Court judicially knows, Fulton County, Kentucky, is in the extreme southwestern corner of Kentucky, bordering upon the Tennessee State line on the south. Hickman, the county seat, is located on the Mississippi River. Union City is the county seat of Obion County, Tennessee, which lies immediately south of Fulton County, Kentucky.

The purchase of defendant's wheat was negotiated on behalf of the Milling Company by one John Creed, a resident of Kentucky, who was employed by the Milling Company *to buy* the defendant's wheat *and ship* it to the Milling Company at Union City, Tennessee, to be there ground into flour at its mill.

Between the date of the purchase in June, 1915, and the time for delivery in July or August, 1915, there was a substantial advance in market price of wheat, and defendant refused to deliver more than a very small portion of the quantity he had contracted to sell. Thereupon the Milling Company sued him in the Circuit Court of Fulton County, Kentucky, for breach of the contract.

The defendant pleaded, among other defenses, that the Milling Company had not complied with Section 571, Kentucky Statutes, above quoted (*ante*, p. 3), and, therefore, its contract for the purchase of defendant's wheat was illegal and void.

To this defense, the Milling Company replied that the contract was a transaction in interstate commerce; that it was beyond the power of the State of Kentucky to regulate or control the Milling Company's right to make the contract in question; and that if the statute should be construed to apply to this transaction, it was void as an attempt by the State of Kentucky to regulate commerce between the States of Tennessee and Kentucky, in violation of the Commerce Clause of the Federal Constitution.

On the original trial, the Fulton Circuit Court held that the contract was a transaction in interstate commerce, and that Section 571, Kentucky Statutes, did not and could not constitutionally apply thereto. The case being submitted to the jury, a judgment was rendered in favor of the Milling Company for \$960.00 (Rec., 13).

From this judgment, the defendant appealed to the Court of Appeals of Kentucky, which reversed the judgment of the Fulton Circuit Court, holding that the transaction was *not interstate* commerce, but was *solely intrastate* commerce and therefore subject to the prohibition contained in Section 571, Kentucky Statutes. The case was sent back to the Circuit Court for retrial in accordance with the opinion of the Court of Appeals.

(Bondurant v. Dahnke-Walker Milling Co., 175 Ky. 774-780—Opinion printed in appendix.)

The case came on for retrial and, following the opinion of the Court of Appeals, the Circuit Court, after hearing testimony for the Milling Company, peremptorily instructed the jury to find for the defendant *on the ground that the Milling Company had not complied with Section 571, Kentucky Statutes*, and therefore its contract for the purchase of the defendant's wheat was illegal and not enforceable in the courts.

A motion for a new trial having been overruled, the case went back to the Court of Appeals, which, on the authority of its first opinion, affirmed the judgment of the Fulton Circuit Court (Rec., 54, 55).

Dahnke-Walker Milling Co. v. Bondurant, 185 Ky. 386.

Thereafter, a writ of error was sued out and the case brought to this Court.

ASSIGNMENTS OF ERROR.

The errors assigned are, briefly stated, as follows (Record, 56, 57):

(1) The Kentucky Court of Appeals *erred in holding* that the contract between the Milling Company and the defendant was a transaction in *intra-state commerce*; that the Milling Company, by engaging in such transaction, had subjected itself to the provisions of Section 571, Kentucky Statutes, and that the contract was void and unenforceable as a transaction in *intrastate commerce*, in violation of Section 571, Kentucky Statutes.

(2) The Kentucky Court of Appeals *erred in holding* that the transaction sued on was not commerce between the States of Tennessee and Kentucky, and therefore exempt by the Commerce Clause of the Federal Constitution from the regulatory power of the State of Kentucky, and *erred in refusing to hold* that Section 571, Kentucky Statutes, in so far as it might be construed to extend or apply to the transaction in question, was and is unconstitutional and void, and in violation of the Commerce Clause of the Federal Constitution, and a void attempt by the State of Kentucky to burden or regulate commerce between the States of Kentucky and Tennessee.

(3) The Kentucky Court of Appeals *erred in upholding* as valid the defense pleaded by the defendant, based upon Section 571, Kentucky Statutes, *the validity of which statute was drawn in question and denied* by the Milling Company on the ground of *its repugnance to the Constitution* of the United States; and *further erred* in deciding that Section 571, Kentucky Statutes, was valid as applied to the contract or transaction forming the basis of this action, and in holding that the contract was void and unenforceable by reason of the said statute, notwithstanding the Milling Company at all times, in the Fulton Circuit Court and in the Kentucky Court of Appeals, specially set up and claimed that the transaction in question was and is a transaction in interstate commerce, and that under the United States Constitution it was beyond the power of Kentucky to regulate or

burden such commerce, or to impose limitations or restrictions thereon by any statute, or to deny the validity of the contract between the Milling Company and the defendant; and *further erred* in denying the Milling Company's contention that Section 571, Kentucky Statutes, is not valid when applied to the transaction between the Milling Company and the defendant, involved in this action, and *further erred* in holding that it is valid, and applying it to said transaction notwithstanding the provisions of the United States Constitution and the rights specially set up and claimed by the Milling Company.

(4) The Kentucky Court of Appeals *erred* in affirming the judgment of the Fulton Circuit Court, which sustained the validity of Section 571, Kentucky Statutes, and applied and enforced same notwithstanding the claim of the Milling Company that said section, so applied, was and is void as a regulation of commerce between the States of Kentucky and Tennessee.

ANALYSIS OF PLEADINGS.

The Kentucky Code of Civil Practice, Section 126 (with certain exceptions, not material here), provides:

“Every material allegation of a pleading must, for the purposes of the action, be taken as true, unless specifically traversed.”

In analyzing the pleadings, this section is important to determine just what allegations are admitted as true, and what are in issue.

We shall consider the pleadings only so far as they bear on the question of interstate or intrastate commerce.

The Petition. (Rec., 1-2.)

The Milling Company alleges its incorporation under the laws of Tennessee with power to buy and sell and do a general milling business; that it contracted with the defendant for wheat to be delivered to its agent at Hickman, Kentucky, and weighed by its agent there and placed on board cars of the N., C. & St. L. R'y Co. *by defendant*; that it agreed to pay for the wheat \$1.04 per bushel *delivered on cars*; that wheat advanced in price and defendant refused to make the deliveries contracted for, thereby causing loss to the Milling Company.

The Milling Company further alleges that it furnished defendant 2200 sacks, and that he failed to return all of them.

The Answer. (Rec., 4-6.)

The answer denies a contract with the Milling Company but affirmatively alleges a contract with one John Creed (shown by the record to be the *agent* of the Milling Company).

The answer further pleads (Rec., 5, 6) that the Milling Company, a Tennessee corporation, "in

undertaking to obtain said wheat f. o. b. cars at Hickman * * * and by reason of other acts * * * in buying and receiving wheat, grain and other farm produce in Fulton County in the State of Kentucky," is engaged in doing business in Kentucky without having complied with the laws of Kentucky permitting it to do business therein. Wherefore the contract is alleged to be void.

The Reply. (Rec., 7-9.)

The real question in this case is raised upon the Milling Company's reply and the defendant's rejoinder thereto. We therefore quote in full the material portions of the reply, italicizing those *material* allegations which are *not controverted* by the rejoinder and are therefore *admitted by the defendant to be true*, under Section 126, Civil Code of Kentucky (Rec., 8, 9):

"The plaintiff further says that *it is a foreign corporation and its home office and place of business is Union City, in the State of Tennessee, and that it is a manufacturer of flour and other food stuffs*, and is engaged in interstate commerce in shipping flour and other food stuffs from Union City in the State of Tennessee to various places in other States, and, as *such manufacturer of flour and other food stuffs* it is engaged in *buying wheat in the State of Kentucky* and in other States and *shipping same out of Kentucky into the State of Tennessee to its mill at Union City in said State.*

"The plaintiff says that *while it was so engaged in this business at Union City, Tennessee,*

its agent, John Creed, *entered into the contract of purchase with the defendant by which the defendant sold all the wheat grown on his lands in the year 1915 and he agreed to haul said wheat from his farms and place same in the cars of the Nashville, Chattanooga & St. Louis Railroad Company at Hickman, Kentucky, and this railroad company was a common carrier engaged in interstate commerce, and it was the intention of both plaintiff and defendant, and the wheat was sold for such purpose, that said wheat would be transported by the N., C. & St. L. Railroad Company from Hickman, in the State of Kentucky, to Union City, in the State of Tennessee.*

"It says that if this wheat had been delivered to it at Hickman on board of said cars it would have immediately been transported from Hickman, Kentucky, to Union City, Tennessee, and therefore it says it was engaged at said time in interstate commerce and was doing no other business in Kentucky except the purchasing of wheat and other grains and transporting same to its mill in Union City, Tennessee, and it says that under the laws of the United States and the Constitution thereof, it was engaged in interstate commerce and is protected by the laws of the United States and the Constitution thereof from any interference whatever on the part of the State of Kentucky, and the statute of law which the defendant attempts to invoke in this case, so far as this plaintiff is concerned is unconstitutional and void, for it says that the Supreme Court—State of Kentucky and the Supreme Court of the United States have both held that the statute which the defendant invokes in this case has no application to one engaged in interstate commerce, and it says that it was so engaged in interstate commerce at said time."

The Rejoinder. (Rec., 12-13.)

When defendant came to respond to the allegations above quoted from the Milling Company's reply, he *did not controvert* any of the allegations italicized in the foregoing quotation. Therefore, they stand confessed as true.

Paragraph 1 of the rejoinder simply pleads that John Creed, the agent of the Milling Company, resides in Fulton County, Kentucky, where *he* has been conducting business for several years and has been making contracts for the *sale to him* of wheat, etc.; that such contracts were never made in Tennessee, and never paid for at any place except Hickman, Kentucky, and delivery has never been required at any point except Hickman; that said transactions have always been "made, delivered, paid for and fully completed entirely within Fulton County, Kentucky." This paragraph repeats the allegation that the Milling Company has never complied with the laws of Kentucky authorizing it to do business therein.

Paragraph 2 denies that in defendant's contract with John Creed for the sale of his wheat, "*it was agreed or was a part of said contract*" that said wheat was to be transported and delivered to the Milling Company at Union City, Tennessee; and defendant further denies that *he* was to deliver said wheat at any point other than Hickman, Kentucky, and alleges that *he* was not in any way responsible for the

transportation of said wheat from Hickman, Kentucky, to any other point.

Paragraph 3 simply repeats in somewhat different form the averments of Paragraph 1.

It will be observed that this rejoinder *does not deny* the material statement of the reply above quoted—that

“it was the *intention* of both plaintiff and defendant, and the wheat was sold for such purpose, that said wheat would be transported by the N., C. & St. L. Railroad Company from Hickman, in the State of Kentucky, to Union City in the State of Tennessee.”

Defendant merely denies that *he* agreed to transport the wheat, or that the agreement with reference to transportation was embodied in or made a *part of the contract* for the sale. *The purpose of the sale is not denied, and the intention to transport from Kentucky into Tennessee is not denied.*

Trial upon issues thus joined.

The affirmative allegations of the rejoinder were controverted of record, and the case went to trial upon the second hearing in the Fulton Circuit Court, with the result already stated.

REVIEW OF EVIDENCE.

Ordinarily, this Court would not consider the evidence or any rulings thereon, in any case brought up on writ of error.

To this rule, there is the well-settled exception that this Court will determine for itself if the facts manifest a Federal right claimed by one of the parties and denied by the State Court.

St. Louis S. W. R'y Co. v. Arkansas, 235 U. S. 350, 362.

Sioux Remedy Co. v. Cope, 235 U. S. 197, 204.

Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 294.

Wagner v. Covington, 251 U. S. 95, 102.

If this were not true, the State Court could, by erroneous findings of fact or erroneous exclusion or admission of evidence, preclude this Court from exercising its own jurisdiction to enforce rights secured to a litigant by the Constitution and laws of the United States.

McGinis v. California, 247 U. S. 91.

Same v. Same, 247 U. S. 95.

In the instant case, a review of the evidence is especially important, because the judgment here complained of was rendered upon a directed verdict, the State Courts assuming to determine *as a matter of law*, from the facts pleaded and proved, that the transaction between the Milling Company and the defendant was purely *intrastate* commerce carried on

by the Milling Company in violation of the Kentucky Statute.

Of course, much of the testimony heard in the court below is immaterial to the question here involved, and we shall lay it to one side.

The following points are material in this connection:

- (1) The business of the Milling Company and its location in Tennessee.
- (2) The nature and extent of Creed's employment as agent of the Milling Company to *buy* grain for it in Kentucky *and ship* it to Tennessee.
- (3) The terms of the contract with defendant.
- (4) The purpose of buying defendant's wheat and transporting it to Tennessee.
- (5) Defendant's participation in or knowledge of such purpose.

Keeping these points in mind, we note the testimony as follows:

Testimony of George Dahnke. (Rec., 19-27.)

Mr. Dahnke is President of the Milling Company.

For ten or twelve years the Milling Company had been buying grain from defendant, through John Creed, at Hickman, Kentucky, known to defendant to be the agent of the Milling Company for the making of such purchases. (Rec., 19-21.)

The Milling Company furnished defendant about 2200 sacks for his use in hauling the wheat from his farm to the cars at Hickman, Kentucky, where it was to be delivered by him. Defendant, of course, knew

these sacks came from the Milling Company, because he returned some of them to the Milling Company at Union City, as shown by his letters. (Rec., 23.)

The wheat bought of defendant in Kentucky by the Milling Company, through Creed as its agent, was bought for the purpose of being ground into flour, feed, etc., by the Milling Company at its mill in Union City, Tennessee. (Rec., 20, 21.)

Testimony of John Creed. (Rec., 27-36.)

Mr. Creed lives at Hickman, Kentucky, where he is engaged in the business of farming and also is "grain buyer" for the Milling Company, "buying alfalfa, any kind of hay, grain and wheat for them."

He was employed by the Milling Company to *buy—not to sell*; hence, under his contract of employment, *buying necessarily involved shipment to his principal*, as he had no authority to do anything else and the Milling Company is not shown to have had any other agent in Kentucky.

Creed had previously made purchases for the Milling Company from the defendant, and defendant knew at the time that Creed was representing the Milling Company. (Rec., 27.)

Referring to this particular contract, Mr. Creed testified as follows (Rec., 30):

"Q. Now Mr. Creed, where was he to deliver the wheat to you?

A. Here in Hickman, *to be delivered to the Railroad, N., C. & St. L. R. R.*, and we had hands

there to empty the wheat and it was to be weighed over my scales.

Q. Now when delivered to you on the cars, where was the wheat to be taken then?

A. *It was to be shipped to Union City, Tennessee."*

On cross-examination, Mr. Creed testified as follows (Rec., 32, 33):

"Q. Now I will ask you what the vendible market value of wheat was in Hickman, Ky., on July 24th, 1915, to August 15th?

A. It was \$1.10 or \$1.12 I don't remember which now.

Q. You say you had been Dahnke-Walker Milling Company's agent here for several years?

A. Yes, sir.

Q. For what purpose, what did you *buy* for them?

A. Wheat, corn, hay, grain, etc., etc.

Q. Where to be delivered?

A. Most any place that it is convenient to the railroad.

Q. Where is it then to be shipped when it gets to the railroad?

A. Shipped to Dahnke-Walker Milling Co.

Q. Where?

A. Union City, Tenn.

Q. You say you bought hay?

A. Yes, sir.

Q. They don't mill hay down there, do they?

A. No, sir, they handle it there at the mill though."

Testimony of J. E. Coble. (Rec., 36-38.)

Mr. Coble is Vice-President of the Milling Company.

He testified (p. 36) that the wheat bought of Mr. Bondurant through the Milling Company's agent, Mr. Creed, was to be taken to Union City, Tennessee.

At the conclusion of testimony for the Milling Company the court directed the jury to render a verdict for the defendant, holding, *as a matter of law*, that the contract was void under Section 571, Ky. Stats.

The testimony above quoted shows that the State Court erroneously held that the transaction was purely *intrastate* commerce, thus deciding against the Milling Company a question of law absolutely vital to the Federal right asserted by it. The jury should have been peremptorily instructed to find that question in favor of the Milling Company. If there was any dispute as to the facts, the question should have been submitted to the jury, and clearly the Court erred in assuming to decide it as it did.

Again, we emphasize the point that this Court has authority to reverse a judgment of a State Court which effects a denial of a Federal right asserted by the plaintiff in error by erroneously excluding testimony tending to establish facts vital to such right.

In *McGinis v. California*, 247 U. S. 91, and *Same v. Same*, 247 U. S. 95, this Court, speaking through Justice McKenna, reversed a judgment of the California Supreme Court, which convicted McGinis of violating the California statute forbidding his possession of opium.

The defense was that the opium was in transit through California to Mexico, and the California Courts excluded evidence tending to establish this defense, as a result of which the defendant was convicted of violating the State law.

This Court reversed the judgments of conviction, for error in the rejection of testimony.

In the instant case, the error committed by the State Court in directing a verdict for the defendant, and *thus excluding from the jury all the testimony*, is available for reversal upon the pending writ of error.

AUTHORITY OF MILLING COMPANY'S AGENT IN KENTUCKY.

This is a matter of controlling importance because the only business the Milling Company can be said to have carried on in Kentucky was that transacted by its agent, John Creed, *pursuant* to such authority as it had conferred upon him.

The evidence shows (and there is no suggestion *contra*) that Creed's authority was *limited to buying in Kentucky and shipping to Tennessee*. His *employment* was *essentially* a part of *interstate commerce*. See, in this connection, *McNaughton v. McGirl*, 20 Mont. 124, cited *post*, pp. 40-42.

The State of Kentucky, under the Commerce Clause, is without authority to exact of Creed a license tax for doing the work in interstate commerce

that he was employed by defendant to do. This is settled by numerous decisions.

Robbins v. Shelby County Taxing District, 120 U. S. 489, 496.

Caldwell v. North Carolina, 187 U. S. 622.

Rearick v. Pennsylvania, 203 U. S. 507.

International Text Book Co. v. Pigg, 217 U. S. 91, 106.

Crenshaw v. Arkansas, 227 U. S. 389, 396.

Sioux Remedy Co. v. Cope, 235 U. S. 197, 204.

Davis v. Virginia, 236 U. S. 697.

Had the Milling Company employed a corporation as its agent to conduct for it in Kentucky exactly the kind of business that Creed was authorized to conduct for it, the State of Kentucky could not have imposed any conditions or limitations upon the right of such corporation to conduct its business as such agent.

Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 21, 27.

American Distributing Co. v. Hayes Wheel Co., 250 Fed. 109.

Hayes Wheel Co. v. American Distributing Co. (C. C. A., Sixth Circuit), 257 Fed. 881.

This last case is quite in point in this connection. (See opinions both in the District Court and in the Circuit Court of Appeals.)

The Hayes Wheel Company, a Michigan corporation, engaged in the manufacture of automobile wheels at Jackson, made a contract with the American Distributing Company, an Ohio corporation, to

act as its selling agent throughout the United States. Thereupon, the Ohio Company established an office in the State of Michigan, from which it carried on its business of securing orders from the *entire country* for the sale of the Wheel Company's products.

Subsequently the Wheel Company breached its contract, and the Distributing Company sued it in the Federal Court. The Wheel Company defended on the ground that the Distributing Company had not complied with the law of Michigan requiring foreign corporations to qualify before doing business in that State.

It was contended by defendant that the contract was not a *sale* in interstate commerce and did not directly involve commercial intercourse with other States, but was merely a business contract made within the State of Michigan. This question was ruled against the defendants, upon a review of the authorities.

The District Court said (250 Fed. 113):

"Applying these rules to the present case, I am of the opinion that the contract in question had such a relation to the subject of interstate commerce *that in itself it constituted such commerce*, and that consequently it was not subject to the provisions of the Michigan statute referred to. If such statute were intended to apply to the making of such a contract, it would be to that extent unconstitutional and void."

The District Court went farther than is required in the instant case and held that the solicitation of

orders *in Michigan* by the Distributing Company was a mere incidental matter and did not constitute doing business in Michigan. Its decision *on this point* was held to be error by the Circuit Court of Appeals, which, however, upon a review of the authorities, indicates very clearly that, as to orders solicited by the Distributing Company *outside of Michigan*, the Michigan statute did not apply, and it could not apply without infringing the Commerce Clause.

The Circuit Court of Appeals says (257 Fed. 888):

“Assuming, as we do, for the purposes at least of this opinion, that plaintiff’s business *so far as it related to business outside of Michigan* was in interstate commerce, it yet seems plain to us, not only that, independently of the question whether plaintiff’s business was local or interstate, it was doing business in Michigan, and so within the statute of that State if it was doing a substantial Michigan business, but also that it was in fact doing a substantial local business in Michigan within the meaning of the law of interstate commerce. We think it a misnomer to characterize its business as essentially interstate. In our opinion it had a substantial local and domestic business, entirely separate from, and not merely incidental to, its interstate business.”

HAS THE MILLING COMPANY VIOLATED THE LAW?

The true test of this question is: Could the State of Kentucky, under the facts shown in this case, have *punished* the Milling Company for a violation of Section 571, Kentucky Statutes?

Unless it could be thus punished, under the facts of *this case*, it is innocent of any offense against the law; and if innocent, its contract is absolutely valid, and the *unmoral* defense to its claim made by the defendant must be rejected by this Court.

In any prosecution by the State of Kentucky against the Milling Company for an alleged violation of Section 571, Kentucky Statutes, it must be conceded that the Milling Company could establish the facts *actually admitted or proved* in this case, as follows:

(1) That it is a citizen of Tennessee, operating a mill at Union City in that State, and that defendant's wheat was in Fulton County, Kentucky;

(2) That it bought defendant's wheat to be ground into flour at its mill in Union City, Tennessee;

(3) That it made the purchase through John Creed, its agent in Hickman, Kentucky, whose sole authority was to *buy* wheat in Kentucky and *ship* the wheat, when delivered by the sellers, to the Milling Company at Union City, Tennessee;

(4) That the contract with defendant provided for delivery by him f. o. b. cars at Hickman, Kentucky. This in itself involved the loading of cars, which in turn involved shipment somewhere.

(5) That defendant knew from previous transactions, and also knew in this transaction, that John Creed, in negotiating the purchase of the wheat, acted as agent for the Milling Company.

(6) That when defendant agreed to load his wheat on the cars of the N., C. & St. L. R'y Co. at Hickman, Kentucky, he was bound to know that the loading was for the purpose of transportation. Railroad cars are available only for transportation, and are not available for storage except as an incident to transportation.

(7) From the evidence, defendant knew that delivery to cars furnished by the N., C. & St. L. R'y Co. meant transportation by that particular Railroad Company, and from the geography of the situation, he knew that such transportation over the line of the N., C. & St. L. R'y Co., as a practical matter, meant transportation out of the State of Kentucky.

(8) However, defendant's knowledge of the situation is immaterial to a prosecution by the Commonwealth of Kentucky under Section 571. The Milling Company, in any such prosecution, could prove its own acts and *its own purposes* and intentions, regardless of any knowledge or notice imputable to the defendant in this case.

Western Oil Refining Co. v. Lipscomb, 244 U. S. 346, 349.

Texas & New Orleans R'y Co. v. Sabine Tram Co., 227 U. S. 111, 126, 130.

Under the authorities and the evidence in this case, it is inconceivable that the State of Kentucky could have convicted the Milling Company of a violation of the statute quoted above. If it is innocent, then its contract with defendant is valid, and the State Courts should have enforced it.

ARGUMENT UPON THE FACTS.

In this connection we shall consider only the *uncontroverted* facts, though, strictly speaking, we have a right to assume as true, not only the uncontroverted material allegations of the Milling Company's reply but every statement made by any witness for the Milling Company, and every inference that a jury, in the exercise of its reasonable discretion, could have drawn from the testimony of the witnesses, if the State Courts had permitted the jury to exercise its judgment in the matter.

Thus viewing the case, we find that the Milling Company was engaged in the operation of a flour mill at Union City, Tennessee, and in buying wheat to be converted into flour at its mill. It had a right to buy wheat in any State of the Union, and the State of Kentucky had no power to prohibit it from buying wheat in Kentucky to be shipped to its mill in Tennessee and there ground into flour.

(1) If the Milling Company had, by letter addressed from its place of business at Union City, Tennessee, to defendant at Hickman, Kentucky, made an offer to buy his wheat at a certain price delivered f. o. b. cars *Union City, Tennessee*, and defendant, by letter mailed from Hickman to the Milling Company, had accepted this offer, the transaction would plainly be interstate commerce.

Robbins v. Shelby County Taxing District, 120 U. S. 489, 495.
U. S. v. Tucker, 188 Fed. 741, 743.

(2) If the Milling Company, instead of writing a letter to defendant, had sent its President, or any other agent, to Hickman, Kentucky, to negotiate the purchase of defendant's wheat on the same terms, clearly this would be interstate commerce.

Robbins v. Shelby County Taxing District, 120 U. S. 489, 495, and cases cited *ante*, p. 20.

(3) The circumstances that the purchase was negotiated for the Milling Company by an agent resident in Fulton County, Kentucky, is wholly immaterial, under the decisions of this Court, and does not change the character of the transaction as interstate commerce.

Lyng v. Michigan, 135 U. S. 161.
Martin v. Commonwealth, 153 Ky. 784.

(4) Nor is the interstate commerce feature of the transaction at all affected by the circumstance that the parties, instead of contracting for delivery f. o. b.

cars Union City, Tennessee, actually contracted for delivery f. o. b. cars, Hickman, Kentucky. It is immaterial where the contract is negotiated, or delivery effected, or title passed.

American Express Co. v. Iowa, 196 U. S. 133, 143, 144.

Kinnear, etc., Mfg. Co. v. Miner, 89 Vt. 572, 96 Atl. 333.

(5) The Milling Company acted in Kentucky only through its agent. The authority of the agent is material. He was an agent for the purpose of *buying for and shipping to* the Milling Company, and *for no other purpose*. Consequently, as agent of the Milling Company, he had no authority to change his mind and to sell the wheat in Kentucky after it had been delivered to him by defendant on board cars, in accordance with the contract. Shipment out of the State was an essential part of the agent's employment and a limitation upon his authority.

American Distributing Co. v. Hayes Wheel Co., 250 Fed. 109.

Hayes Wheel Co. v. American Distributing Co. (C. C. A. 6th Cir.), 257 Fed. 881.

(6) The Kentucky Court of Appeals, in this case (Bondurant v. Dahnke-Walker Milling Co., 175 Ky. 774, 777), suggests that the Milling Company, after acquiring title to and possession of defendant's wheat at Hickman, Kentucky, under the contract made for it by its agent, *might thereafter change its*

mind with reference to shipment and instruct its agent to sell the wheat in Kentucky.

This, of course, would require an *entirely new transaction* based upon *entirely new authority* to the agent. The circumstance is wholly immaterial, and the same thing might occur even if the parties had contracted for delivery f. o. b. cars Union City, Tennessee, instead of Hickman, Kentucky.

In passing upon the rights of the parties to a contract, the Courts do not speculate about what might be done by one of them after the contract has been fulfilled, or in the course of its fulfillment. The Courts take a practical view of the transaction actually agreed upon, and of the purposes and objects of *that* transaction.

Parker Harris Motor Co. v. Kissel Motor Car Co., 165 Wis. 518, 163 N. W. 141 (hereinafter fully cited, p. 38).

ARGUMENT UPON THE LAW.

Was the purchase of defendant's wheat purely intrastate commerce, or was it *to any extent* a transaction in interstate commerce between the States of Kentucky and Tennessee?

Elements of Commerce.

This Court has repeatedly had occasion to outline the elements entering into and forming *parts* of commerce.

“ ‘Commerce’ is a term of the largest import. It comprehends *intercourse* for the purposes of

trade in any and all its forms, including the transportation, *purchase*, sale and exchange of commodities."

Welton v. Missouri, 91 U. S. 275, 280.

Whether a particular transaction is interstate or intrastate commerce, is determined by applying the practical tests of ordinary business.

"Interstate commerce is a practical conception, and what falls within it must be determined upon consideration of established facts and known commercial methods."

Public Utilities Commission v. Landon, etc.,
249 U. S. 236, 245.

Savage v. Jones, 225 U. S. 501, 520.

Rearick v. Pennsylvania, 203 U. S. 512.

Swift & Co. v. U. S., 196 U. S. 398, 399.

"In determining whether commerce is interstate or intrastate, regard must be had to its essential character. Mere billing or *the place at which title passes* is not determinative. If the actual movement is interstate, the power of Congress attaches to it."

Pennsylvania R. R. Co. v. Clark Coal Co., 238
U. S. 456, 466.

"That it is the nature of the traffic, and not its accidents, which determines its character, is illustrated by Ohio Railroad Commission v. Worthington, *supra*."

Texas & New Orleans R. R. Co. v. Sabine
Tram Co., 227 U. S. 111, 126.

While transportation is a part of commerce between the States, it is *not the only part*; it is merely one of its elements. Either transportation or de-

livery may be the *last* of several steps in a transaction classed by this Court as commerce between the States.

Generally speaking, commerce between the States consists of four distinct elements :

- (1) Negotiations between the parties, leading to
- (2) A contract between them, which calls for
- (3) Delivery of the thing contracted for, which in turn involves or occasions
- (4) Transportation between the States.

These are successive steps constituting one transaction in interstate commerce. The steps do not always take place in the order stated. Transportation *may precede* or it *may follow* delivery.

In those cases where the seller goes into the buyer's State and negotiates the sale, transportation *may* precede delivery. On the other hand, where the buyer goes into the seller's State, transportation *may* follow delivery, as ~~in~~ the instant case. In either case, the parties *may* contract for delivery in the *one* State or the *other*, as they deem proper, and this does not take away the interstate commerce feature of the transaction.

American Express Co. v. Iowa, 196 U. S. 133, 134.

Kinnear, etc., Mfg. Co. v. Miner, 89 Vt. 572, 96 Atl. 333.

It has time and again been held by this Court that transportation is not the *only* element of commerce between the States. As a matter of fact, in the

great case of *Gibbons v. Ogden*, 9 Wheat. 1, it was *conceded* that commerce between the States included *negotiation*, buying and selling, and it required that decision to establish the principle that power to regulate commerce also included the power to regulate transportation.

On this point, Chief Justice Marshall said of commerce between the States (9 Wheat. 189, 190):

"The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation (that is, transportation—parenthesis ours). this would restrict a general term, applicable to *many* objects, to *one* of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in *all its branches*, and is regulated by prescribing rules for carrying on that intercourse."

That commerce between the States includes *negotiations* between the parties, and that a State has no power to forbid such negotiations has been so often stated by this Court that quotation of the decisions would be an infliction upon the Court.

Weeks v. U. S., 245 U. S. 618, 622.

Robbins v. Shelby County Taxing District, 120 U. S. 489, 497.

Rearick v. Pennsylvania, 203 U. S. 507.

Butler Bros. Shoe Co. v. U. S. Rubber Co. (C. C. A., Eighth Circuit), 156 Fed. 1. *Certiorari* denied, 212 U. S. 577.

Crenshaw v. Arkansas, 227 U. S. 389, 396.

Davis v. Virginia, 236 U. S. 697.

It so happens, that in most cases on the subject, the seller has gone into the buyer's State and negotiated sales under contracts *some* of them calling for *delivery* in the *seller's* State, and *some* for *delivery* in the *buyer's* State.

In the instant case, the buyer goes into the seller's State and negotiates a contract which calls for delivery in the seller's State but *just as certainly contemplates transportation between the States*, although the seller assumes no responsibility for the transportation further than agreeing to deliver f. o. b. cars. It requires no elaboration to show that no just ground of distinction exists on this account.

It can not conceivably make any difference, so far as interstate commerce is concerned, whether the buyer goes into the seller's State or the seller goes into the buyer's State to conduct the negotiations, the ultimate object of which is transportation between the States, effected at the instance of the one party or the other.

¹ In *American Express Co. v. Iowa*, 196 U. S. 133, the State of Iowa contended that if merchandise shipped from one State to another *is completely delivered to the buyer at the point of shipment*, then the movement is *not interstate commerce*.

This Court, speaking through the present Chief Justice, *denied this contention* and said in that connection (p. 144):

"If upheld, the doctrine would deprive a citizen of one State of his right to order merchandise from another State at the risk of the seller as to delivery. *It would prevent the citizen of one State from shipping into another unless he assumed the risk*; it would subject contracts made by common carriers and valid by the laws of the State where made, to the laws of another State, and it would remove from the protection of the interstate commerce clause all goods on consignment upon any condition as to delivery, express or implied. * * *

In *Swift & Co. v. U. S.*, 196 U. S. 375, this Court, speaking through Justice Holmes, said (pp. 398, 399):

"When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. *What we say is true at least of such a purchase by residents in another State from that of the seller and of the cattle.* And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated."

The privilege of conducting commerce between the States is a right secured by the Commerce Clause of the Federal Constitution, beyond any limitation

or control by the several States. It applies for the protection of corporations as well as individuals.

Crutcher v. Kentucky, 141 U. S. 47.

W. U. Tel. Co. v. Kansas, 216 U. S. 1, 47.

International Text Book Co. v. Pigg, 217 U. S. 91, 105.

Sault St. Marie v. International Transit Co., 234 U. S. 333, 341.

Sioux Remedy Co. v. Cope, 235 U. S. 197, 201, 203, 204.

Some of the cases from the inferior Federal Courts and from the Supreme Courts of the various States are quite in point in the instant case.

American Distributing Co. v. Hayes Wheel Co., 250 Fed. 109.

Hayes Wheel Co. v. American Distributing Co. (C. C. A., Sixth Circuit), 257 Fed. 881.

These cases have been cited fully *ante*, pp. 20-22.

Parsons-Willis Lumber Co. v. Stuart (C. C. A., Fifth Circuit), 182 Fed. 779, 783 (Reversing *In re Conecuh Pine Lumber Co.*, 180 Fed. 249).

In this case a contract was made in Kentucky, by a Kentucky corporation, for the purchase of lumber to be sawed and delivered to it for shipment in Alabama.

The District Court had held the contract subject to the laws of Alabama, and had denied the Parsons-Willis Lumber Company the right to sue thereon because it had not complied with the laws of Alabama.

The Circuit Court of Appeals reversed this judgment and held that the contract was made in Kentucky, and while the lumber was to be delivered in Alabama, there was no evidence to show that the Parsons Company, prior to qualifying in Alabama, had sold or shipped any lumber to any point in Alabama, and all lumber delivered to the Parsons-Willis Lumber Company and shipped *by it* from the point of delivery, prior to its qualification in Alabama, was shipped out of the State of Alabama.

The Court said (p. 782):

“A foreign corporation has the right to sell articles of commerce anywhere in Alabama, and to ship them to the purchasers, and any attempt to interfere with such business would be an interference with interstate commerce. *The converse of the proposition must also be true; namely, that a foreign corporation may buy, or make a contract with a citizen of Alabama to buy, articles of commerce—subjects of trade and barter offered in the market.*”

Citing the Robbins case, 120 U. S. 489, the Court said (p. 782):

“We can perceive no difference in manufacturing and selling machinery by a manufacturer in Ohio for, and to be delivered for transportation to, a purchaser in Colorado, and in manufacturing and selling lumber in Alabama to a purchaser in Kentucky, or lumber to be shipped by the seller, on orders of the purchaser, to Kentucky, or to any other point outside the State of Alabama.”

Again, the Court said (pp. 782, 783):

"Such transactions are *constantly* taking place in this State—as, for instance, the manufacture and sale by cotton mills of their product to foreign corporations; also like transactions in lumber and naval stores. We do not think it can be justly contended that the purchasers are amenable to the laws of the State invoked in this case."

The Court denies the contention (p. 783) that having an agent in Alabama to inspect and receive the lumber subjected the Parsons Company to the operation of the Alabama laws.

Kesterson, etc. v. La Moine Lumber, etc., Co.
(C. C. A., Ninth Circuit), 193 Fed. 355.

This case affirmed a judgment rendered by District Judge Wolverton in *La Moine Lumber, etc., Co. v. Kesterson*, 171 Fed. 980.

The facts, as reported in the District Court and in the Circuit Court of Appeals, present a situation almost *identical* with the *instant* case.

It appears that a California corporation, which had not qualified to do business in Oregon, went into that State and there made a contract with Kesterson, a citizen and resident of Oregon, for lumber to be cut and delivered at Woodville Station in Oregon. Kesterson broke the contract, and the La Moine Company, as assignee thereof, brought suit to recover damages for the breach.

Among other defenses, Kesterson pleaded, as in the instant case, that neither the La Moine Company nor its assignor had qualified to do business in Oregon, and that its contract with the assignor was void.

The plaintiff in that case, as in this, alleged that the purchase was made for shipment out of the State of Oregon into the State of California. This was denied by the defendant, and the District Court held that this made an issue to be passed on by the jury.

When the proof was introduced, establishing the facts as above indicated, the District Judge peremptorily charged the jury upon this issue, in the following language (See 193 Fed. 358, 359) :

“I instruct you, as to that issue, that the contract was made with a view upon the part of the defendants, and a knowledge of that fact, that this lumber was to be shipped from Woodville, out of the State of Oregon, into the State of California, or elsewhere beyond the confines of the State of Oregon. This makes of the contract an interstate transaction; that is to say, the parties were dealing in interstate commerce. * * *”

No exception to this instruction was taken by the defendants in the case, and the Circuit Court of Appeals therefore considered itself precluded from considering whether the contract was so concerned with interstate commerce as to free it from the operation of the Oregon statute. However, the case stands as an unchallenged decision by the District Court, though it is necessary to refer to the report of the case in the Circuit Court of Appeals to ascertain what the District Court decided on this point.

Parker-Harris Motor Co. v. Kissel Motor Car Co., 165 Wis. 518, 163 N. W. 141.

In this case the president of the Parker-Harris Company (a Tennessee corporation) came to the home office of the Kissel Car Company at Hartford, Wisconsin, and there made a contract for the purchase of a certain number of motor cars to be delivered at stated intervals for a specified price f. o. b. Hartford, Wisconsin, the cars to be thence shipped as directed by plaintiff, and to be handled by it as an independent merchant in certain designated territory. The plaintiff was prohibited by the contract from selling the automobiles in any other territory. The court said:

“Such transactions constitute interstate commerce in substantially as pure and simple a form as it is possible to have them occur.”

The defendant argued that the plaintiff might sell the cars after delivery in Wisconsin, by obtaining its consent. The court said this would be to *make a new contract*; that while under the contract as made, delivery was completed and title passed in Wisconsin, defendant had brought the cars for shipment out of the State and for sale in other States, and that constituted interstate commerce.

Kinnear, etc., Mfg. Co. v. Miner, 89 Vt. 572, 96 Atl. 333.

The Kinnear Company was an Ohio corporation. It made a contract with the defendant to furnish him certain materials for his building at Brattleboro,

Vermont: these materials to be delivered to defendant in Ohio. The defendant, Miner, accepted the goods at the point of delivery, shipped them to himself in Vermont and used them in his building there. It appeared that the Kinnear Company *had been* doing business in Vermont contrary to a statute similar to Section 571 of the Kentucky Statutes. The court said *that could not affect its right* of recovery in this *particular* transaction involving *interstate* commerce.

Miner argued that the transaction was not interstate commerce because when he received the goods in Ohio he was *free to resell them* at the point of shipment or elsewhere in that State, and, this being so, no interstate transaction was necessarily involved.

The court said that by fair if not necessary construction the record showed that the delivery to defendant in Ohio was made in the customary way of delivering goods to a carrier to be transported to Vermont; that the contract sued on contemplated and involved an interstate shipment; that the character of interstate commerce attached to the goods the moment they were so delivered for transportation (Citing authorities).

The court said that it was immaterial how transportation from one State to another is effected—whether by the seller or the buyer; that the Commerce Clause of the Federal Constitution is for the benefit and protection of the buyer as well as of the seller; and further said:

"It is just as important that the former should be free to go into another State to buy for shipment to and use in his own State as it is that the latter should be free to go into another State to dispose of and deliver his goods."

(Citing Justice White's opinion in *American Express Co. v. Iowa*, 196 U. S. 133, upholding 'the right of a citizen of one State to freely contract to receive merchandise from another State, and of the equal right of the citizen of a State to contract to send merchandise into other States.')

Livingstone Mfg. Co. v. Rizzi Bros., 86 Vt. 419, 85 Atl. 912.

The Livingstone Company was a Maine corporation which had not qualified to do business in Vermont. *Through an agent who resided at Barre, Vermont*, it sold granite tools and supplies to Rizzi Brothers. This agent had been engaged in doing business for it for some time. In a suit brought by the Livingstone Company for the purchase price of certain tools sold to Rizzi, defense was made on the ground that the Livingstone Company had not complied with the laws of Vermont entitling it to do business in that State.

The court held that the transaction was part of interstate commerce involving a Federal right to be tested by Federal law.

McNaughton Co. v. McGirl, 20 Mont. 124, 49 Pac. 651, 38 L. R. A. 367.

In this case the McNaughton Company, a New Jersey corporation, engaged in the business of a wool commission merchant in the State of Montana, made

a contract with McGirl at Billings, Montana, in July, 1892, for the consignment of a lot of wool by McGirl to the McNaughton Company, as commission agent in New York, to be sold by it for McGirl on sixty days' credit, the proceeds of the sale to be paid to McGirl by the McNaughton Company less commissions, advances and proper charges.

At the time of the contract the McNaughton Company advanced to McGirl more money than the net proceeds of the wool when finally sold by it in New York, it being agreed that McGirl would make a proper refund or settlement if the net proceeds did not amount to as much as the sum advanced.

McGir having declined to pay, suit was brought against him in the State Courts in Montana, and McGirl pleaded that the McNaughton Company had not complied with the law of Montana entitling it to do business in that State.

The McNaughton Company responded to this plea by contending that the transaction was interstate commerce and that it was not obliged to comply with the Montana statute. The Supreme Court of Montana upheld this contention, and in doing so used the following language:

“ * * The agent did no other kind of business for the corporation in Montana. Such being the case, it seems clear to us his business directly pertained to interstate commerce. It related to intercourse and traffic between Montana and New York, and the subject-matter of the intercourse and traffic was the wool itself,*

"If the Northern Pacific Railroad, in transporting the wool over its road between Montana and Minnesota, was engaged in interstate commerce—as clearly it was—we can not perceive how the transaction by which the wool itself was exchanged through consignment or sale by defendant to plaintiff can be excluded from any reasonable definition of 'commerce among the States.' * * *

"* * * The foreign corporations in all those instances were domiciled in other States, and through their commercial agents solicited business and sold and shipped goods to points in the other States in which laws existed imposing upon foreign corporations compliance with certain conditions precedent to their right to do business within such States.

"But the opinions were all based upon the reasoning that the goods sold were commodities, subject to barter and sale, and that the sale, transportation, and delivery of goods and the transaction of business between a foreign corporation of one State and a citizen of another State constituted interstate commercial transactions, which *corporations*, as well as *individuals*, could carry on free from any restraint by any State.

"But, as we have heretofore seen, the transaction pertaining to the wool shipped by the defendant to the plaintiff in this case is obviously brought within the same rule. It is just as much an interstate commerce transaction to *export* wool from Montana to New York as it is to *import* clothes made of the wool from New York to Montana. Either transaction is interstate commerce, and neither can be interfered with by local law."

We shall comment further upon this McNaughton case in reviewing the opinion of the Kentucky Court of Appeals in the instant case.

Union Cotton Oil Co. v. Patterson, 116 Miss. 802, 77 Sou. 795.

In this case the buyer went into the seller's State and their contract was *made there*, calling for *delivery there*.

The Cotton Oil Company, an Alabama corporation, made a contract with Patterson & Co. for 50 tons of cottonseed, to be shipped on or before October 25, 1916, at \$49.00 per ton *f. o. b. cars Como, Mississippi*—"mill weights to govern."

The Cotton Oil Company had not complied with the laws of Mississippi, and Patterson having broken the contract, it sued and was met with the defense of non-compliance.

The Court held that this was an interstate transaction and that the Cotton Oil Company was not required to comply with the Mississippi law. Its decision was based, in part at least, upon the fact that the contract used the expression, "mill weights to govern," and it was held that this "*contemplated*" transportation *by the buyer*, the Cotton Oil Company, from Como, Mississippi, to its mill in Alabama, and this stamped the transaction with an interstate character, although the *seller's delivery was complete* before the interstate movement began.

Transportation Cases Considered.

The business of common carriers engaged in transporting the goods of others affords the simplest test for distinguishing between interstate and intrastate commerce.

This Court has repeatedly held that the intention of a shipper to have his shipment moved to an ultimate destination outside the State of its origin, fixes the character of the movement as interstate commerce, even though such intention of the shipper was not communicated to the carrier at the inception of the movement.

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 527.

Especially is this true where, as a practical matter, the movement of the goods is obviously intended to go beyond the bounds of the State.

Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111.

Ohio Railroad Commission v. Worthington, 225 U. S. 101.

Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111.

In this case, the Sabine Company had a sawmill at Ruliff in Texas. W. A. Powell Company was a corporation engaged in buying lumber for export through the ports of Sabine and Port Arthur, both in Texas. On August 28, 1906, the Powell Company bought of the Sabine Company pine lumber, under a

contract which called for delivery f. o. b. cars at Sabine, to which point the Railroad Company transported it from Ruliff.

The Sabine Company treated this as an intrastate shipment and tendered payment of the rate prescribed by the Texas law. The Railroad Company declined to accept this tender, and demanded and received a higher rate authorized by the export tariffs filed with the Interstate Commerce Commission.

The Sabine Company paid this higher rate and sued to recover the difference between the export rate and the intrastate rate.

The Texas Court held that this was an intrastate shipment and that the intrastate rate applied, but its judgment was reversed by this Court, which examined the facts and, finding no local market for lumber at Sabine, held that it was obviously intended for export, and that the Texas law as to intrastate rates did not apply.

The Court was called on to determine the question as to whether the transportation movement was in intrastate commerce or in foreign commerce. It held that it was in foreign commerce, and that the foreign commerce started when the goods actually started for their destination in a foreign country or *were delivered to a carrier for transportation.*

This Court said (p. 126):

"That it is the nature of the traffic, and not its accidents, which determines its character, is illustrated by *Ohio Railroad Commission v. Worthington, supra.*"

Again, on page 130, the Court said:

"The lumber was ordered, manufactured and *shipped* for export. And we say shipped, for we regard it of no consequence that the Sabine Company had no concern or connection with it after it reached Sabine. Its relation to the shipment was a perfectly natural one and did not change the relation of the Powell Company to it and make the lumber other than lumber purchased at Ruliff and started from there in transportation to a foreign destination. * * * Nor, as we have seen, did the absence of a definite foreign destination alter the character of the shipments."

Obviously, these same conditions apply to defendant's wheat when loaded on cars at Hickman, Kentucky. The only practicable movement of the wheat by the Railroad Company was out of Kentucky, as an examination of the map will show.

Nor does the circumstance that a bill of lading has *not* been issued by the carrier convert its handling of the goods, while assembling them for transportation over its line, change the interstate character of a shipment *intended* for movement to another State.

Philadelphia & Reading R'y Co. v. Hancock, 253 U. S. 284, 286.

Taxation Cases Considered.

In studying the cases where taxation by the State is assailed as an unconstitutional burden upon interstate commerce, it is necessary to distinguish carefully the nature of the tax assailed in each particular case.

Generally speaking, the taxation cases involve the validity of four classes of taxes imposed by the States; namely:

- (1) Occupation or privilege taxes.
- (2) Peddler's licenses.
- (3) Inspection fees.
- (4) *Ad valorem* or property taxes.

Different principles are applied by this Court in determining the validity of these four classes of taxes when assailed as burdens upon interstate commerce.

As to occupation or privilege taxes:

Speaking generally, occupation or privilege taxes imposed by the State upon the right to conduct within its limits a business purely in interstate commerce, are always void.

- Western Oil Refining Co. v. Lipscomb, 244 U. S. 346.
 Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.
 Robbins v. Shelby County Taxing District, 120 U. S. 489.
 Caldwell v. North Carolina, 187 U. S. 622.

W. U. Tel. Co. v. Kansas, 216 U. S. 1.

International Text Book Co. v. Pigg, 217 U. S. 91, 105.

Davis v. Virginia, 236 U. S. 697.

Crenshaw v. Arkansas, 227 U. S. 389, 396.

In *Western Oil Refining Co. v. Lipscomb*, 244 U. S. 346, the State of Tennessee undertook to levy a privilege tax upon the Oil Company, an Indiana corporation, which had shipped into Tennessee a tank car of oil from its oil refinery in Illinois, and a separate carload of steel barrels from its plant in Indiana, for the purpose of filling orders for oil previously accepted by it from customers in Tennessee. In filling the orders, the Oil Company shipped the tank car of oil and the carload of barrels, to its own order at Columbia, Tennessee, where its traveling agent filled the orders previously accepted from customers at that place. The cars were then forwarded to Mt. Pleasant, Tennessee, where the remaining contents of both cars were removed and delivered to customers at that point whose orders had been previously accepted.

This Court held that this was interstate commerce, which could not be regulated or taxed by the State of Tennessee. In doing so, the Court repeated the proposition often stated by it, that it is the essential character of commerce which determines whether it is interstate or intrastate, and not the accident of through or local bills of lading (p. 349).

In *W. U. Telegraph Co. v. Kansas*, 216 U. S. 1, the question involved was the power of the State of

Kansas to levy a tax upon the business of interstate commerce conducted by the Telegraph Company.

The opinion of Justice Harlan quotes with approval from *Crutcher v. Kentucky* the following language (p. 21):

"To carry on interstate commerce is not a franchise or privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the *accession of mere corporate facilities* as a matter of convenience in carrying on their business can not have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject. * * *

Again, on page 27, the Court says:

"On the contrary, it is to be deduced from the adjudged cases that a corporation of one State, authorized by its charter to engage in lawful commerce among the States, may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce. It may go into the State without obtaining a license from it for the purposes of its interstate business, and without liability to taxation there, *on account of such business.*" (Court's italics.)

It would be superfluous to cite further authorities in this connection.

As to peddler's licenses:

These cases stand upon a different footing. Licenses for itinerant vendors of commodities are sus-

tained, as a proper exercise by the State of its police power for the protection of its citizens from irresponsible hawkers and peddlers—*provided* there is *no* discrimination against the goods or products of other States.

Emert v. Missouri, 156 U. S. 296.

Wagner v. Covington, 251 U. S. 95-102.

On the other hand this Court and the Kentucky Court of Appeals have repeatedly held that a State *can not*, in the exercise of any police power claimed by it, *exclude* a foreign corporation from coming into its bounds for the purpose of transacting interstate commerce or *impose any conditions* upon its conduct of such commerce.

Sioux Remedy Co. v. Cope, 235 U. S. 197-201-203-204, and cases cited *supra*, pp. 20-31.

Louisville Trust Co. v. Bayer Steam Soot Blower Co., 166 Ky. 744-749, and cases cited therein and in this case, 175 Ky. 776.

As to inspection fees:

Taxes levied by the State in the form of inspection fees may be valid, even as to property brought into the State in interstate commerce, provided the tax is limited to the cost of inspection, but it is well settled

“that inspection fees, so grossly in excess of the cost of inspection, imposed upon articles brought into the State in interstate commerce, are unconstitutional.”

Standard Oil Co. v. Graves, 249 U. S. 389, 395.
Foote & Co. v. Maryland, 232 U. S. 494.

Askren v. Continental Oil Co., 252 U. S. 444,
449.

Minnesota Rate Cases, 230 U. S. 350, 408.

As to ad valorem or property taxes:

The validity of *ad valorem* or property taxes upon the subjects of interstate commerce depends upon still another principle. If the goods, upon which the tax is levied, form a part of the mass of property in the State levying the tax, dependent for protection *solely* upon the State, such goods may be subjected to a property tax by the State which affords the protection.

(1) In some of the cases the tax is levied by the State *from which* the owner intends to ship the goods which are taxed, but at the time of the tax levy the goods have not been separated from the mass of property in the State and have not been actually delivered to a carrier for transportation in interstate commerce.

In such cases it is held that they are properly subject to *ad valorem* taxes.

In *Coe v. Errol*, 116 U. S. 517, this Court said (p. 526):

“Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the State, or *committed to the custody of a carrier* for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State?”

To same effect, see *Diamond Match Co. v. Ontonagon*, 188 U. S. 82.

(2) In some of the cases an *ad valorem* or property tax is levied by the State in which the property *after transportation* from *another State* has come to rest either permanently or for some essential purpose, taking it out of interstate commerce for the time being.

In such cases the tax may be valid.

American Steel & Wire Co. v. Speed, 192 U. S. 500.

General Oil Co. v. Crain, 209 U. S. 211, 231, and cases therein cited.

Bacon v. Illinois, 227 U. S. 504.

Banker Bros. v. Pennsylvania, 222 U. S. 210.

(3) Where the property (the subject of interstate commerce has been actually delivered to a carrier for transportation, it is no longer *dependent* solely upon the State for protection, but it comes under the protection of the Federal Government. As to such property, Congress has regulated the liability of the carrier (as in the Carmack and Cummins amendments) and has also provided penalties for stealing such goods from a common carrier.

Act of Feb. 13, 1913, 37 Stat. 670, Chap. 50.
U. S. Comp. Stat., Sec. 8603.

Obviously, the principles governing the validity of a property tax on property which *has been* or which may *hereafter* become the subject of interstate commerce, are widely different from the principles

governing the right of the State to tax or to regulate the *actual conduct* of interstate commerce.

Pure Food and Quarantine Cases Considered.

These cases involve principles essentially different from those applying to the instant case. It may be that, in the absence of any action by Congress, the State has in itself a certain police power to distinguish between sound and unsound articles of commerce. Of course, an arbitrary exercise of this power is void.

We merely allude to these cases by way of differentiating them.

Savage v. Jones, 225 U. S. 501, 520.

Reid v. Colorado, 187 U. S. 137.

Original Package Cases Considered.

These cases only apply to the *buyer's* right to *resell*, in his own State, goods introduced from *another State* in the original package. Hence they are not in point.

Leisy v. Hardin, 135 U. S. 100.

Austin v. Tennessee, 179 U. S. 343.

A critical review of the various classes of cases in interstate commerce above outlined compels the conclusion that the *negotiations* between the defendant and the Milling Company (through its agent, John Creed) for the purchase of defendant's wheat,

to be delivered f. o. b. cars at Hickman, Ky., with the purpose and intention on the part of the Milling Company (as evidenced by the only authority given to its agent, John Creed) to ship the wheat when loaded on cars at Hickman, Ky., to itself at Union City, Tenn., necessarily constitute *part* of a transaction in *interstate* commerce, which the State of Kentucky is powerless to regulate or control.

REVIEW OF LOWER COURT'S OPINION.

The last opinion of the Court of Appeals appears in the Record at page 55—officially reported, 185 Ky. 386. It merely adheres to its first opinion, *sub nom.* Bondurant v. Dahnke-Walker Milling Co., 175 Ky. 774, 780, which, for convenience of the court, is printed as an appendix to this brief.

The Court of Appeals distinguishes some of its former opinions, which clearly hold that Section 571, Kentucky Statutes, is void as to *interstate* commerce. It bases its decision in the instant case upon the ground that the transaction in this case is purely *intrastate* commerce. We quote as follows the pertinent portions of the opinion:

“An analysis of the terms of the contract shows that the wheat was purchased in Kentucky, to be delivered and paid for in Kentucky, and at a time when the wheat and all the parties were in Kentucky. The title to the property, under the contract, was to pass from the vendor to the vendee in Kentucky.

"No further thing was to occur or to be performed *beyond* the boundary line of the State of Kentucky to make a complete *compliance with the contract*, nor had any negotiations been theretofore carried on with reference to the contract between the appellant and appellee whilst the latter was in the State of Tennessee.

"The wheat was not to be consigned for delivery, to any point or to any person, outside of the State, so far as the terms of the contract require. The appellee, when it should have received and paid for the wheat in this State, might resell it, in this State or ship it to such point as it desired, or otherwise dispose of it in this State, according to its pleasure.

"There was nothing in the terms of the contract which required the consignment or shipment of the wheat from Kentucky to another State in order to make a full compliance with it.

"How can this contract be distinguished from one entered into, in this State, between citizens of this State, for the sale and delivery of a product then in this State? The only distinguishing feature would be that one of the parties was a citizen of a State other than the State of Kentucky. Such a fact, however, could not convert a transaction into a transaction in interstate commerce, which was not otherwise an interstate transaction.

"No one would contend that because a citizen of another State, who should be in the State of Kentucky and should purchase an article in this State, receive same and pay for it in this State, was engaged in interstate commerce, although he might have an intention to return at once to his own State and take the article with him.

"In the instant case, had it been necessary in order to a complete compliance with the contract, that the wheat should have been delivered to the

appellee in the State of Tennessee, there would then have been no doubt of its being a transaction in interstate commerce."

The reasoning of the opinion, though plausible, is fallacious. It assumes that there can be no interstate commerce in transactions of this character unless the seller undertakes, *himself*, in some way or other to become responsible for transportation or delivery outside the limits of his own State.

Indeed, the Court says (175 Ky. 778):

"It has often been held that a manufacturing concern in another State, which sends its agent into this State to sell goods by sample, the order to be approved in the State of the manufacturer, is engaged in interstate commerce. *Com. v. McMorrow, etc.*, 25 R. 41; *Com. v. Eclipse Hay Press Co.*, 31 R. 824; *Com. v. Baldwin*, 29 R. 1075. In *Com. v. McMorrow, etc.*, *supra*, it was said that 'these decisions rest upon the theory that an order taken for goods by a traveling salesman in the employ of a foreign corporation does not constitute the contract itself, and that the contract has existence only from the time of the confirmation of the order.'

"It has also been held that a citizen of a State who, without any contract with a citizen of another State for the sale and delivery of goods to him, takes his goods into the latter State and there exposes them for sale, that such sales so made are not transactions of interstate commerce, but transactions of a purely intrastate character; and a tax levied by a State upon the occupation of selling goods wholly within the State is not an interference with interstate commerce, although the goods may have their origin in another State.

“Where all of the contract, sale and delivery are all made in the same State, such transactions lack all of the elements of the negotiations between the citizens of different States, for the sale of goods then in one State, to be delivered in another, so as to invest it with the character of an interstate transaction. Such contracts have nothing to give them an interstate character. *City of Newport v. French Bros. Bauer Co.*, 169 Ky. 174, and cases therein cited; *City of Newport v. Wagner*, 168 Ky. 641, and cases therein cited.”

The decisions of this Court show that this is not the test of interstate commerce; that *the mere place of delivery* does not determine the question.

American Express Co. v. Iowa, 196 U. S. 133-143-144, and cases cited *supra*, pp. 30-32.

The Court concedes, in the language first above quoted, that if defendant had agreed to deliver the wheat at Union City, Tenn., the contract would have been interstate commerce, but because he merely agreed to deliver it f. o. b. cars at Hickman, Ky., transportation being thenceforward at the expense and risk of the Milling Company, it is assumed that the transaction, so far as the defendant is concerned, is purely intrastate commerce.

Again, the Court, in the language first above quoted from its opinion, *speculates* about what the Milling Company *might* have done after it bought the wheat and had it *delivered f. o. b. cars* Hickman, Ky. It suggests that the Milling Company *might* thereafter have sold the wheat *thus delivered* to it, at Hickman, without transporting it out of Kentucky.

As we have already pointed out, this would be essentially a *different* transaction, *entirely outside* the scope of either party's intentions; *entirely inconsistent* with the established purpose of the Milling Company, and *entirely inconsistent* with any authority which John Creed, as its agent at Hickman, had to act for it.

The Wisconsin case (*Parker-Harris Motor Co. v. Kissel Motor Car Co.*, 165 Wis. 518, 163 N. W. 141) and the Vermont case (*Kinnear Mfg. Co. v. Miner*, 89 Vt. 572, 96 Atl. 333), cited *supra*, pp. 38, 39, afford a complete and convincing answer to this speculative suggestion.

What we have heretofore said seems to us sufficiently to indicate that the speculation indulged in by the Kentucky Court of Appeals in this case is entirely outside the range of this transaction and absolutely in conflict with the settled decision of this Court in construing transactions of this sort to be interstate commerce.

The Court refers to cases where the vendor, *in advance of negotiations for the purchase of his goods or of any contract therefor*, himself transports them into the State of the vendee's residence and there *peddles* them out to such as may choose to buy.

Newport v. French Bros., 169 Ky. 174.

Newport v. Wagner, 168 Ky. 641.

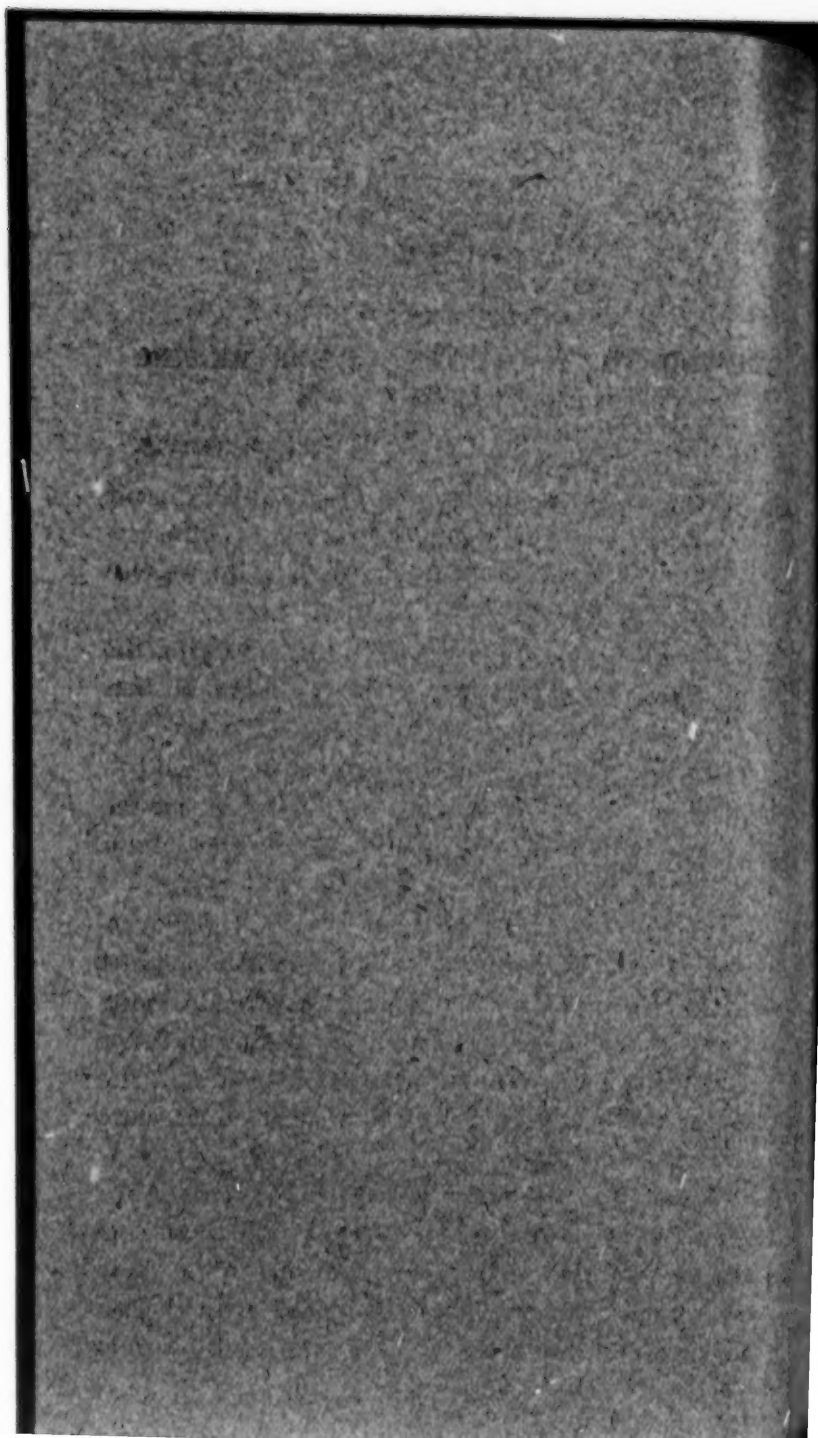
It assumes that such cases are governed by the same principles as apply to the instant case, but such

an assumption ignores the several elements that go to make up commerce between the States (*ante*, p. 30).

Transportation is one element—an essential element—in interstate commerce, but it is not the only one, and either buyer or seller may effect the transportation. In fact, there may be transportation of goods across a State line, and no commerce at all resulting therefrom, because there may be no change of ownership; the owner of them may not sell at all. He simply, by his own act, introduces his goods into another State, where they become part of the mass of property in that State, provided they are not in the hands of a common carrier for transportation.

It is only in these cases that this court has held a sale by the owner, subsequent to his introduction of *his own* goods into the State where he subsequently negotiates a contract for their sale, is an *intrastate* transaction. (See *Wagner v. Covington*, 251 U. S. 95.)

The two cases of *Newport v. French Bros.*, 169 Ky. 174, and *Newport v. Wagner*, 168 Ky. 641, involve the same principles and exactly the same kind of transactions as those involved in *Wagner v. Covington*, 251 U. S. 95; hence they are not applicable to the instant case, although relied upon by the Kentucky Court of Appeals.



APPENDIX.

BONDURANT v. DAHNKE-WALKER MILLING COMPANY, 175 KY. 774.

Opinion of the Court by Judge Hurt—Reversing.

This action was instituted in the Fulton Circuit Court by the appellee, Dahnke-Walker Company, against the appellant, C. T. Bondurant, to recover damages for the alleged breach of a contract which the appellant and appellee had made, involving the sale and delivery of about fourteen thousand bushels of wheat, as estimated.

After the pleadings had been made up, a trial followed before the court and a jury, and as a result the jury found a verdict in favor of the appellee and a judgment was rendered accordingly.

The appellant's motion for a new trial was overruled and he seeks a reversal of the judgment against him. Several grounds for reversal are urged, among which is the contention that the court erred in denying appellant's motion for a directed verdict at the close of the testimony for appellee and at the close of all the evidence.

One of the grounds urged as a reason for a directed verdict is that the appellee is a foreign corporation, and engaged in doing business in the State of Kentucky without having complied with the requirements of Section 571, Kentucky Statutes, and

for that reason the contract between him and appellee was not enforceable.

The appellant presented as one of his defenses that appellee was a foreign corporation and was engaged in doing business in the State of Kentucky, and that in making the contract sued upon was so engaged, and that it had never complied with any requirement of Section 571, *supra*, by having one or more places of business in this State, and an authorized agent or agents thereat upon whom process could be served, and had not filed in the office of the Secretary of State a statement signed by its president or secretary, giving the location of its office or offices in this State, and name or names of its agent or agents thereat, upon whom process could be served.

The appellee, admitting that it was a foreign corporation, organized and having its chief place of business in the State of Tennessee, and had not complied with the requirements of Section 571, *supra*, but denied that it was engaged in doing business in the State of Kentucky, and alleged that the making of the contract sued upon was an engagement in interstate commerce, and hence its actions could not and were not affected by the provisions of Section 571, *supra*; while appellant contends that the business transacted with him, which was the basis of the action against him, was purely an intrastate transaction.

There were some minor differences in the evidence, as to the terms of the contract, but the undisputed facts proven, about which there were no con-

traditions, show that the terms of the contract were that about the 15th day of June, 1915, or a few days thereafter, the appellant and John Creed, an agent of appellee, entered into the contract sued upon, at Hickman, Ky.; that both appellant and Creed were citizens of Kentucky; that appellant agreed to sell and deliver the crop of wheat grown by him upon his lands, in this State, during the year 1915, to appellee or to its agent, on board the cars at Hickman, Ky., within a reasonable time after same should be threshed, not later than the 10th day of August, and appellee, or its agent, was at the time of such delivery and at the place of delivery, and concurrent therewith, to pay to appellant the contract price for the wheat, which was one dollar and four cents per bushel.

The appellant testified that Creed did not represent to him that he was making the contract for or on behalf of appellee, and the testimony of Creed fails to show that he disclosed his principal, although he makes the statement that appellant knew in what capacity he was contracting. This difference, however, is not important.

The evidence does not disclose that the contract contained any stipulation that the wheat was to be consigned to any one or to any place by appellant when put on board the cars, and hence it must be assumed that the appellee, when the wheat was delivered, might consign it to such person or to such destination or to do with it as it saw fit.

This court has heretofore held that Section 571, *supra*, does not have any application to a foreign corporation which is engaged strictly in interstate commerce with citizens of this State, and that so far as the provisions of the section may seem to require a foreign corporation to comply with its requirements as a condition precedent to engaging in interstate commerce with citizens of this State, it is void. Such commerce can be regulated by the Federal Congress only. *Louisville Trust Co. v. Bayer S. S. B. Co.*, 166 Ky. 746; *Three States Buggy Co. v. Com.*, 105 S. W. 971; *Com. v. Baldwin*, 29 R. 1074; *Com. v. Eclipse Hay Press Co.*, 104 S. W. 224; *Ryman Steam Boat Co. v. Com.*, 125 Ky. 253; *Com. v. Hogan*, 74 S. W. 737; *Com. v. McMorrow, etc.*, 25 R. 41.

It is also well settled that a State may impose any condition it desires upon a foreign corporation for permitting it to engage in intrastate business. *Com. v. Read Phosphate Co.*, 113 Ky. 32; *Mfg. Co. v. Ferguson*, 113 U. S. 727; *Insurance Co. v. Cravens*, 178 U. S. 389; *Hooper v. California*, 155 U. S. 648; *Waters Pierce Oil Co. v. Texas*, 177 U. S. 29.

In so far as Section 571, *supra*, regulates the transaction of business by foreign corporations within this State, other than interstate commerce, it is not in conflict with the provisions of the Federal Constitution. *Knoxville Nursery Co. v. Com.*, 108 Ky. 6; *Com. v. M. & O. R. Co.*, 24 R. 784.

Hence, if the contract sought to be enforced was an interstate commerce transaction, the failure to

comply with Section 571, *supra*, would not affect the right of appellee to sue and recover upon its contract, but if it was an intrastate business, the failure to have complied with Section 571, *supra*, is fatal to appellee's right of recovery for the breach of such a contract, as it was held by this court, in *Oliver v. Louisville Realty Co.*, 156 Ky. 628, that it was unlawful for a foreign corporation, without first having complied with Section 571, *supra*, to engage in business in this State, other than interstate commerce, and contracts entered into for the transaction of such business were unlawful, and that the courts would not give their assistance in the enforcement of unlawful contracts. *Fruin-Colmon Contracting Co. v. Chatterson*, 146 Ky. 504. A contract is always void if it is prohibited by statute, although the statute does not declare contracts to be illegal which are made in violation of it. *VanMeter v. Spurrier*, 94 Ky. 22; *Lindley v. Rutherford*, 17 B. M. 246.

So the question for decision is, was the contract between appellant and appellee one which is protected by article I, chapter 8, paragraph 3, of the Federal Constitution, from regulation by the State of Kentucky, as being a transaction in interstate commerce?

An analysis of the terms of the contract shows that the wheat was purchased in Kentucky, to be delivered and paid for in Kentucky, and at a time when the wheat and all the parties were in Kentucky. The

title to the property, under the contract, was to pass from the vendor to the vendee in Kentucky.

No further thing was to occur or to be performed beyond the boundary line of the State of Kentucky to make a complete compliance with the contract, nor had any negotiations been theretofore carried on with reference to the contract between the appellant and appellee whilst the latter was in the State of Tennessee.

The wheat was not to be consigned for delivery, to any point or to any person, outside of the State, so far as the terms of the contract require. The appellee, when it should have received and paid for the wheat in this State, might resell it in this State, or ship it to such point as it desired, or otherwise dispose of it in this State, according to its pleasure.

There was nothing in the terms of the contract which required the consignment or shipment of the wheat from Kentucky to another State in order to make a full compliance with it.

How can this contract be distinguished from one entered into, in this State, between citizens of this State, for the sale and delivery of a product then in this State? The only distinguishing feature would be, that one of the parties was a citizen of a State other than the State of Kentucky. Such a fact, however, could not convert a transaction into a transaction in interstate commerce, which was not otherwise an interstate transaction.

No one would contend that because a citizen of another State who should be in the State of Kentucky and should purchase an article in this State, receive same and pay for it in this State, was engaged in interstate commerce, although he might have an intention to return at once to his own State and take the article with him.

In the instant case, had it been necessary in order to a complete compliance with the contract, that the wheat should have been delivered to the appellee in the State of Tennessee, there would then have been no doubt of its being a transaction in interstate commerce.

It has often been held that a manufacturing concern in another State which sends its agent into this State to sell goods by sample, the order to be approved in the State of the manufacturer, is engaged in interstate commerce. *Com. v. McMorrow, etc.*, 25 R. 41; *Com. v. Eclipse Hay Press Co.*, 31 R. 824; *Com. v. Baldwin*, 29 R. 1075.

In *Com. v. McMorrow, etc.*, *supra*, it was said that "these decisions rest upon the theory that an order taken for goods by a traveling salesman in the employ of a foreign corporation does not constitute the contract itself, and that the contract has existence only from the time of the confirmation of the order."

It has also been held that a citizen of a State who, without any contract with a citizen of another State for the sale and delivery of goods to him, takes his goods into the latter State and there exposes them

for sale, that such sales so made are not transactions of interstate commerce, but transactions of a purely intrastate character: and a tax levied by a State upon the occupation of selling goods wholly within the State, is not an interference with interstate commerce, although the goods may have their origin in another State.

Where all of the contract, sale and delivery are all made in the same State, such transactions lack all of the elements of the negotiations between the citizens of different States, for the sale of goods then in one State, to be delivered in another, so as to invest it with the character of an interstate transaction. Such contracts have nothing to give them an interstate character. *City of Newport v. French Bros. Bauer Co.*, 169 Ky. 174, and cases therein cited; *City of Newport v. Wagner*, 168 Ky. 641, and cases therein cited.

All of the cited cases have been decisions arising under the laws and in the courts of the States wherein the delivery of the goods sold was made, and we have not been referred to any case wherein the contract, sale and delivery of the goods were made wholly within one State, and of goods then in such State, and from a citizen of such State, that the transaction has been held to be one of interstate commerce, although the purchaser might contemplate removing the goods into another State after the sale and delivery to him.

The case of MacNaughton v. McGirl, 38 L. R. A. 367, relied upon by appellee as sustaining the position that it was engaged in interstate commerce, does not sustain such contention. In that case the agent of the MacNaughton Company, which was a corporation engaged in doing business in New Jersey, under the laws of which State it was organized, went into the State of Montana and entered into a contract on behalf of his principal, for the shipment of a consignment of wool from the State of Montana to New Jersey, and to be by the principal sold on commission. The MacNaughton Company advanced to the shipper of the wool a sum of money, under an agreement that when the wool should be shipped to New Jersey and sold, if it brought more than the sum advanced, the shipper, after payment of the commissions, should be paid the residue, but if it sold for less than the sum advanced, the shipper should make good the deficit to the Company. The wool sold for less than the sum advanced, and the Company sued the shipper in the courts of Montana to recover the deficit.

In Montana there exists a statute similar to Section 571, *supra*, and the shipper relied upon the failure of the MacNaughton Company to having complied with the requirements of that statute, as a defense against the right of the Company to maintain a suit against him in Montana, and the court held that his contention could not be maintained, because the transaction was one in interstate commerce.

It will be observed that in that contract it was required that the wool be shipped from Montana to the State of New Jersey and there to be sold, which was a feature which characterized the transaction as one in interstate commerce and very different from the instant case, where the contract, sale and delivery of the thing sold was all effected in the State of Kentucky, and the contract to be entirely completed within the State, of the sale of goods then in the State, and made by a citizen of the State. The proof also shows that the appellee had made other transactions in the State of a similar character to the one in controversy.

Having arrived at the conclusion that the contract sued on was one which had relation to doing business in the State of Kentucky, and not a transaction in interstate commerce, and it appearing that the appellee had never complied with the requirements of Section 571, *supra*, which was a condition precedent to its right to do business within this State, the contract was unlawful, and the court should not have given its assistance to a recovery for a breach of it, but should have sustained the motion for a directed verdict. With this view of the case, it is unnecessary to consider any other questions raised on the appeal.

The judgment is therefore reversed and cause remanded for proceedings consistent with this opinion.

FILED
MAR 10 1921

JAMES D. MAHER,
CLERK

Supreme Court of the United States

October Term, 1920

No. [REDACTED] 30

DAHNIKE-WALKER MILLING COMPANY,

Plaintiff in Error,

versus

C. T. BONDURANT, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

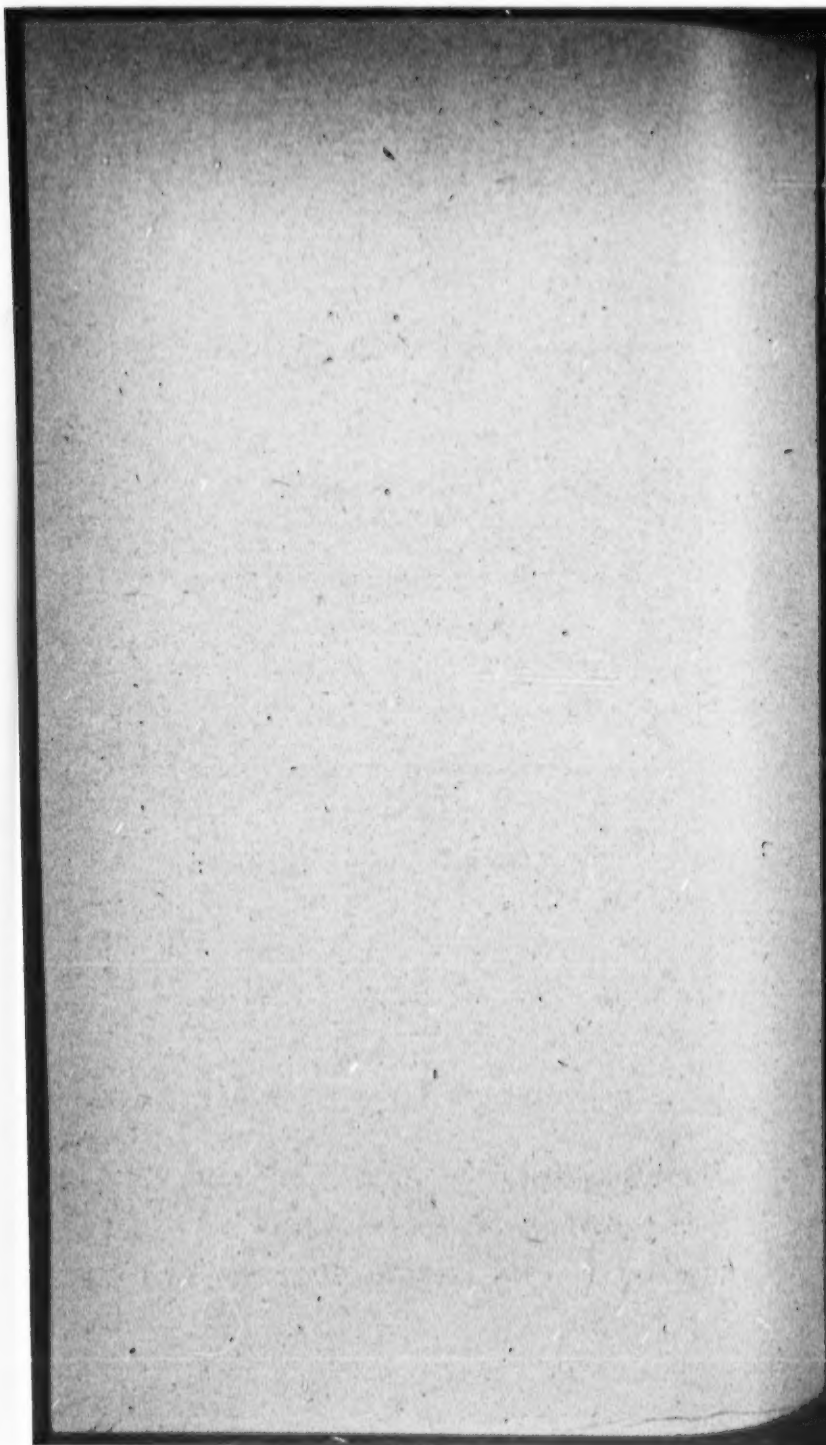
In Error to the Court of Appeals of Kentucky.

M. Walton Hendry,

B. T. Davis,

W. J. Webb,

Attorneys for Defendant in Error.



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224.
Com. v Hogan, 74 S. W. (Ky.) 737.
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Tex., 204 U. S. 403.
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Ky. 746.
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971.

The Daniel Ball, 10 Wall 565.

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Waters Pierce Oil Co., v. Texas, 177 U. S. 29.

SUPREME COURT OF THE UNITED STATES

October Term, 1920.

No. 235.

Dahnke-Walker Milling
Company, Plaintiff in Error
versus

C. T. Bondurant, Defendant in Error

**BRIEF FOR DEFENDANT IN ERROR
PARTIES**

The plaintiff in error is a corporation created under the laws of the state of Tennessee. The defendant in error is a resident of Fulton County, Ky., and owns and operates a farm in this county. In this brief we shall hereafter refer to them respectively as plaintiff and defendant.

STATEMENT OF CASE

On June 15, 1915, the defendant and John Creed

an agent of plaintiff, entered into a contract in which the defendant agreed to sell and deliver the crop of wheat grown by him in Kentucky during that year to plaintiff or its agent on board the cars at Hickman, Ky., for which plaintiff or its agent was, at the time of delivery, to pay the contract price. Creed was also a citizen of Kentucky, and he and plaintiff both claim him to be the agent of the plaintiff; but this fact was not disclosed by Creed to the defendant, although Creed claims that defendant knew this. It is not claimed that the contract required the wheat to be consigned to any one or to any place by defendant when put upon the cars; therefore, when delivered, it might be consigned to such person or place as plaintiff saw fit.

Kentucky Statutes, Sec. 571, provides:

"All corporations except foreign insurance companies formed under the laws of this or any other State, and carrying on any business in this State, shall at all times have one or more known places of business in this State, and an authorized agent or agents thereat, upon whom process can be served; and it shall not be lawful for any corporation to car-

ry on any business in this State until it shall have filed in the office of the Secretary of State a statement, signed by its president or secretary, giving the location of its offices or office in this State, and the name or names of its agent or agents thereat upon whom process can be served; and when any change is made in the location of its office or offices, or in its agent or agents, it shall at once file with the Secretary of State a statement of such change; and the former agent shall remain agent for the purpose of service until statement of appointment of the new agent is filed; and if any corporation fails to comply with the requirements of this section, such corporation, and any agent or employe of such corporation, who shall transact, carry on or conduct any business in this State, for it, shall be severally guilty of a misdemeanor, and fined not less than one hundred nor more than one thousand dollars for each offense."

The plaintiff had not complied with this Statute at the time of the making of this contract or when this suit was instituted. It seeks to avoid the provisions of this Statute upon the claim that it was not engaged in doing business in the State of Kentucky, but that the making of the contract sued up-

on was an engagement in interstate commerce; while defendant insists that it was an Intrastate transaction.

POWER OF STATE AS TO FOREIGN CORPORATION.

A state may impose any condition it desires upon a foreign corporation for permitting it to engage in intrastate business. *Com. v. Read Phosphate Co.*, 113 Ky. 32; *Mfg. Co. v. Ferguson*, 113 U. S. 727; *Insurance Co. v. Cravens*, 178 U. S. 389; *Hooper v. California*, 155 U. S. 648; *Waters Pierce Oil Co. v. Texas*, 177 U. S. 29. As also Sec. 571 regulates transaction of business by foreign corporations within this State other than interstate commerce and is not in conflict with the provisions of the Federal Constitution. *Knoxville Nursery Co. v. Com.* 108 Ky. 6; *Com. v. M. & O. R. Co.*, 24 R. 784; *Oliver v. Louisville Realty Co.*, 156 Ky. 628; *VanMeter v. Spurrier*, 94 Ky. 22; *Lindley v. Rutherford*, 17 B. M. 246. On the other hand, it is held by other authority in Kentucky that the application of Sec. 571 to foreign corporations engaged strictly in interstate commerce with citizens

of this state is void. *Louisville Trust Co. v Bayer S. S. B. Co.* 166 Ky. 746; *Three States Buggy Co. v. Com.*, 105 S. W. 971; *Com. v. Baldwn*, 29 R. 1074; *Com. v. Eclipse Hay Press Co.*, 104 S. W. 224; *Ryman Steam Boat Co. v. Com.*, 125 Ky. 253; *Com. v. Hogan*, 74 S. W. 737; *Com. v. Mc-Morrow, etc.*, 25 R. 41.

QUESTION INVOLVED.

The question, therefore, in this case is whether the contract in question was an interstate transaction; and if so, the error relied upon by plaintiff must be sustained. If it is not an interstate transaction, then it must be denied. The findings of the Kentucky Court of Appeals upon the facts were to the effect that it was not an interstate transaction, but was an intrastate transaction.

STATEMENT OF FACTS

A statement of the facts relative to the making and completion of this contract is that it was made between John Creed and the defendant in Kentucky; that it was to be delivered to him on board the cars at Hickman, Ky., and to be paid for in Kentuc-

ky, all of the parties and all of the transactions in making the contract and in executing the same to be and occur in the State of Kentucky. Upon the delivery of the wheat by the defendants and the payment being made therefor, the title passed and defendant had no further interest, right, or title in the same or further control thereof. No part of the contract was negotiated or made outside of the State of Kentucky, nor was it to be sent to any person outside of the State of Kentucky. The contention is made by the plaintiff that it was the intention of the plaintiff when the wheat had been delivered to it for it to be at once shipped to its mills in Union City, Tenn., where it was to be manufactured into flour and sold by it, and that it was engaged in interstate commerce; and that this being its intention, it thereby became an interstate commerce transaction.

WHAT IS INTERSTATE TRANSACTION?

“Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.” The Daniel Ball, 10 Wall, 565.

WHAT IS NOT INTERSTATE TRANSACTION?

"But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state or committed to a common carrier for transportation to that state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state and never put in cars for transportation out of the state. Carrying it from the farm or the forest to the depot is only an interior movement of the property entirely within the state for the purpose, it is true, but only for the purpose, of putting it into a course of exportation. It is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is matter altogether in fieri and not at all a fixed and certain thing." *Coe vs. Errol*, 116 U. S. 517-525.

This case, it seems to us, applies with great

force to the facts in the present case and in rebutting the contention of the plaintiff. *Gulf, Colorado & Sante Fe R. R. Co. v. State of Texas*, 204 U. S. 403 appeals to us as a case announcing the rule on a state of facts very similar to the facts in this case, in which some corn was carried from Texarkana, Texas, to Golthwaite, Texas, upon a bill of lading showing it only for local transportation was a continuation of a shipment from Hudson, S. D. to Texarkana, Texas, and that such transportation was not interstate commerce in which the Court used this language:

"Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn was a matter immaterial so far as the completed transportation was concerned."

Applicable to the facts in this case, the contract between these parties was completed before the articles became a subject of transportation, and it is immaterial what may have been the thought or purpose of the plaintiff. An article manufactured for export to another state does not make it an article of interstate commerce. The intent of the

manufacturer does not determine when the article belongs to commerce. U. S. v. E. C. Knight Co., etc., 156 U. S. 1. Actual motion in transportation is essential. Bennett v. American Express, 83 Me. 236.

ARGUMENT.

Tested by these authorities, we cannot understand how it can be insisted that the facts in this case justify the contention that this is an interstate transaction. We know it is true that if this contract had provided that the defendant was to ship this wheat to Union City, Tenn. and there be paid for, or if there had been anything in this contract that contemplated crossing a state line, it would become interstate matter, and the authorities submitted by plaintiff all embrace cases of this character; but as we understand the law, the question of the intention of one of the parties as to the disposition of the property cannot be material or in any manner affect or determine the meaning of the contract. Creed had been the agent of the plaintiff in Kentucky for a number of years and permitted to act as its agent as if the purchase of grain

were being made on his own account and not for the principal, and to complete and carry out the entire transactions as if they were his own. No contracts were made in the name of the principal. He would pay for such grain by giving his individual checks, nor does it appear that he disclosed to anyone that he was not buying the grain for himself. Each of his purchases was a completed transaction.

We respectfully submit that the contract in question is not an interstate transaction and that the plaintiff is subject to the regulations under Sec. 571 of the Kentucky Statutes, and failing to comply with the same, that it cannot come into the courts of Kentucky and enforce a contract made in violation of law.

Respectfully submitted,

M. Walton Hendry,

B. T. Davis,

W. J. Webb,

Attorneys for

Defendant in Error.

LIST OF AUTHORITIES CITED

Cook County vs. Calumet & C. C. & D. Co., 138 U. S., 635

Ferry vs. King Co., 141 U. S., 668.

Foster's Federal Practice, Vol. 3, page 2002.

Kentucky Statutes, Section 571.

Seaboard Airline Railway vs. Seeger, 207 U. S., 73.

SUPREME COURT OF THE UNITED STATES

DAHNIKE-WALKER MILLING COMPANY,

Plaintiff in Error.

versus.

C. T. BONDURANT,

Defendant in Error.

**SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR
ON QUESTION OF JURISDICTION**

A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had where is drawn in question the validity of a statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or authority exercised under, any state on the ground of their being repugnant to the Constitution, treaties or laws of the United States and a decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.

The defendant in error relied upon the following section of the Kentucky Statutes in avoidance of the enforcement of the contract in question or the right of the plaintiff in error to maintain this ac-

tion in the state courts of Kentucky: Kentucky Statutes, Sec. 571, which is as follows:

"All corporations, except foreign insurance companies, formed under the laws of this or any other state and carrying on any business in this state shall, at all times, have one or more known places of business in this state and an authorized agent or agents thereat upon whom process can be served, and it shall not be lawful for any corporation to carry on any business in this state until it shall have filed in the office of the Secretary of State a statement signed by its president or secretary giving the location of its office or offices in this state and the name or names of its agent or agents thereat upon whom process can be served, and when any change is made in the location of its office or offices or in its agent or agents, it shall at once file with the Secretary of State a statement of such change, and the former agent shall remain agent for the purpose of service until statement of appointment of a new agent is filed, and if any corporation fails to comply with the requirements of this section, such corporation and any agent or employee of such corporation who shall transact, carry on or conduct any business in this state for it, shall be severally guilty of a misdemeanor and fined not less than \$100.00 nor more than \$1000.00 for each offense."

Plaintiff in error denied the application of this statute to it for the reason that it was a foreign corporation engaged in business in Union City in the State of Tennessee, and in the purchase of the wheat, the subject of the contract, the same was purchased for the purpose of being transported to it at Union City, Tennessee, and that in so doing it was engaged in interstate commerce, and that the contract in question was an interstate transaction, and that the statute in question was in conflict with the Constitution of the United States prohibiting the interference by state statutes of interstate commerce.

The findings of the Kentucky Court of Appeals from the facts were that the contract in question was made and executed wholly in the State of Kentucky, and that the statute in question could not interfere with interstate commerce transactions but the contract being made and executed wholly in Kentucky, was an intrastate transaction and not interstate, and upheld the statute as to intrastate contracts. Therefore, under the findings of fact in this case, the validity of this statute was not sustained as not in conflict with, or repugnant to, the Constitution or laws of the United States. On the contrary, its attempted application to an interstate transaction could not, by the decision, be upheld.

Where a state statute applies to both intrastate and interstate shipments, but the shipment involved in wholly intrastate, this Court will not consider the validity of the statute when applied to interstate shipments. *Foster's Federal Practice*, Vol. 3, page 2002. *Seaboard Airline Railway vs. Seegers*, 207 U. S., 73.

The validity of a statute is not drawn into question every time that a right claimed under such statute is controverted; nor is the validity of an authority drawn in question every time that an act done by such authority is disputed. *Cook County vs. Calumet & C. C. & D. Co.*, 138 U. S., 635. *Ferry vs. King Co.*, 141 U. S. 668.

In discussing the statute drawn in question in *Seaboard Airline Railway vs. Seegers*, 207 U. S., page 109, the Court in its opinion, said:

"The supreme court of the state held the section constitutional, a decision conclusive so far as the state constitution is concerned, and, therefore, we are limited to a consideration of its alleged conflict with the Constitution of the United States. The shipment was wholly intrastate, being from Columbia, South Carolina to McBee, South Carolina, and undoubtedly subject to the control of

the state. It is, of course, unnecessary to consider the validity of the statute when applied to a shipment from without the state."

This Court having called attention of counsel to the question of jurisdiction in this case, we respectfully submit that the validity of the statute attacked in this case is not upheld except as to intrastate transactions, and is not, therefore, drawn in question in this case or being exercised in contravention of any federal statute.

We respectfully submit this brief on this question as to the jurisdiction of this Court to entertain the application for a writ of error in the case.

Respectfully submitted,

W. J. Webb,

M. Walton Hendry,

Attorneys for Defendant in Error.

DAHNKE-WALKER MILLING COMPANY v.
BONDURANT.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 30. Argued March 18, 1921; restored to docket for reargument June 6, 1921; reargued October 10, 1921.—Decided December 12, 1921.

1. A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was, not merely a claim of a right or immunity under the Constitution, but a distinct and timely insistence that, if so applied to it, the statute was unconstitutional and void, necessarily affirms the validity of the statute when so applied, and the judgment based thereon is therefore reviewable by writ of error under § 237, Jud. Code, as amended by the Act of September 6, 1916. P. 288.
2. That the statute, in such case, is not claimed to be invalid *in toto* and for every purpose is immaterial, since a statute may be invalid as applied to one state of facts and yet valid as applied to another; and a litigant, moreover, can be heard to question a statute's validity only when and in so far as it is being, or is about to be, applied to his disadvantage. P. 289.
3. The right to review the validity of a state statute under Jud. Code, § 237, is independent of the grounds or reasons on which the state court upholds the validity of the statute. P. 289.
4. Where the state court denied enforceability to a contract made by a foreign corporation, upon the grounds that the contract was local in character and that the corporation had not complied with a statute conditioning the right of foreign corporations to do local business, although the corporation insisted that the contract was made in interstate commerce and that the statute, so applied, was therefore unconstitutional, *held* that the judgment was reviewable here by writ of error. P. 290.
5. Interstate commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. P. 290.
6. Just as, where goods in one State are transported into another for purposes of sale, the interstate commerce embraces their sale after they reach their destination and while they are in the original packages, on the same principle, where goods are pur-

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Argument for Plaintiff in Error.

chased in one State for transportation to another, the commerce includes the purchase quite as much as it does the transportation. P. 290.

7. A corporation of one State may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is *pro tanto* void under the commerce clause. P. 291.
8. A Tennessee corporation, in pursuance of its practice of purchasing grain in Kentucky to be transported to and used in its Tennessee mill, made a contract for the purchase of wheat, to be delivered in Kentucky on the cars of a public carrier, intending to forward it as soon as delivery was made. *Held*, that the transaction was in interstate commerce, notwithstanding the contract was made and to be performed in Kentucky, and that the possibility that the purchaser might change its mind after delivery and sell the grain in Kentucky or consign it to some other place in that State, did not affect the essential character of the transaction. P. 292.

185 Ky. 386, reversed.

ERROR to a judgment of the Court of Appeals of Kentucky which affirmed a judgment of a court of first instance on a verdict directed for the defendant in an action for damages for breach of contract, brought by the plaintiff in error.

Mr. John C. Doolan, with whom *Mr. Joseph E. Robbins*, *Mr. R. G. Robbins*, *Mr. Edmund F. Trabue*, *Mr. Thomas Kennedy Helm* and *Mr. James P. Helm, Jr.*, were on the brief, for plaintiff in error.

While transportation is a part of commerce between the States, it is merely one of its elements. Either transportation or delivery may be the last of several steps in a transaction classed by this court as interstate commerce. In those cases where the seller goes into the buyer's State and negotiates the sale, transportation may precede delivery. On the other hand, where the buyer goes into the seller's State, transportation may follow delivery, as in the instant case. In either case, the parties may contract for delivery in the one State or the other, as they deem

proper, and this does not take away the interstate commerce feature of the transaction. *American Express Co. v. Iowa*, 196 U. S. 133; *Kinnear Manufacturing Co. v. Miner*, 89 Vt. 572. In *Gibbons v. Ogden*, 9 Wheat. 1, 189, 190, it was conceded that commerce between the States included negotiation, buying and selling, and it required that decision to establish the principle that power to regulate commerce also included the power to regulate transportation.

Swift & Co. v. United States, 196 U. S. 375, 398, 399; *Parsons-Willis Co. v. Stuart*, 182 Fed. 779, 783; *Kesterson v. La Moine Lumber Co.*, 139 Fed. 355, affirming 171 Fed. 980; *Parker-Harris Motor Co. v. Kissel Motor Car Co.*, 165 Wis. 518; *Kinnear Manufacturing Co. v. Miner*, 89 Vt. 572; *Livingstone Manufacturing Co. v. Rizzi Brothers*, 86 Vt. 419; *McNaughton Co. v. McGirl*, 20 Mont. 124; *Union Cotton Oil Co. v. Patterson*, 116 Miss. 802.

This court has repeatedly held that the intention of a shipper to have his shipment moved to an ultimate destination outside the State of its origin fixes the character of the movement as interstate commerce, even though such intention was not communicated to the carrier at the inception of the movement. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498. Especially is this true where, as a practical matter, the movement of the goods is obviously intended to go beyond the bounds of the State. *Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111; *Ohio R. R. Commission v. Worthington*, 225 U. S. 101; *Philadelphia & Reading Ry. Co. v. Hancock*, 253 U. S. 284.

Mr. M. Walton Hendry, for defendant in error, submitted. *Mr. B. T. Davis* and *Mr. W. J. Webb* were also on the briefs.

A State may impose any condition it desires upon a foreign corporation for permitting it to engage in intrastate

business. *Commonwealth v. Read Phosphate Co.*, 113 Ky. 32; *Manufacturing Co. v. Ferguson*, 113 U. S. 727; *Insurance Co. v. Cravens*, 178 U. S. 389; *Hooper v. California*, 155 U. S. 648; *Waters Pierce Oil Co. v. Texas*, 177 U. S. 29.

The statute in question regulates transaction of business by foreign corporations within the State other than interstate commerce and is not in conflict with the Federal Constitution. *Knoxville Nursery Co. v. Commonwealth*, 108 Ky. 6; *Oliver v. Louisville Realty Co.*, 156 Ky. 628; *Van Meter v. Spurrier*, 94 Ky. 22; *Lindley v. Rutherford*, 17 B. Mon. 246. On the other hand the application of the statute to foreign corporations engaged strictly in interstate commerce with citizens of the State is void. *Louisville Trust Co. v. Bayer Co.*, 166 Ky. 746, and other cases.

Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. *The Daniel Ball*, 10 Wall. 565. But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. *Coe v. Errol*, 116 U. S. 517, 525. This case, it seems to us, applies with great force to the facts here.

The contract between these parties was completed before the articles became a subject of transportation, and it is immaterial what may have been the thought or purpose of the plaintiff. *Gulf, Colorado & Santa Fe R. R. Co. v. Texas*, 204 U. S. 403; *United States v. Knight Co.*, 156 U. S. 1. Actual motion in transportation is essential. *Bennett v. American Express Co.*, 83 Me. 236.

Where a state statute applies to both intrastate and interstate shipments, but the shipment involved is wholly intrastate, this court will not consider the validity of the statute when applied to interstate shipments. 3 Foster's Fed. Prac., p. 2002; *Seaboard Air Line Ry. v. Seegers*, 207 U. S. 73.

The validity of a statute is not drawn into question every time a right claimed under it is controverted; nor is the validity of an authority drawn in question every time an act done by such authority is disputed. *Cook County v. Calumet Co.*, 138 U. S. 635; *Ferry v. King County*, 141 U. S. 668.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action to recover damages for the breach of a contract for the sale and delivery of a crop of wheat estimated at 14,000 bushels. The plaintiff was a Tennessee corporation engaged in operating a flour and feed mill at Union City, in that State. The defendant was a resident of Hickman, Kentucky, and extensively engaged in farming in that vicinity. They were the parties to the contract. It was made at Hickman and the wheat was to be delivered and paid for there. But the delivery was to be on board the cars of a common carrier, and the plaintiff intended to ship the wheat to its mill in Tennessee. A small part of the crop was delivered as agreed, but delivery of the rest was refused, although the plaintiff was prepared and expecting to receive and pay for it. A payment advanced on the crop more than covered what was delivered. At the time for delivery wheat had come to be worth several cents per bushel more than the price fixed by the contract. The action was brought in a state court in Kentucky.

The principal defense interposed—the only one which we have occasion to notice—was to the effect that the plaintiff had not complied, as was the fact, with a statute of Kentucky (Ky. Stats. 1915, § 571) prescribing the conditions on which corporations of other States might do business in that State, and that the contract was therefore not enforceable. To this the plaintiff replied that the only business done by it in Kentucky consisted in purchasing

wheat and other grain in that State for immediate shipment to its Tennessee mill and then shipping the same there; that the contract in question was made in the course of this business and with the purpose of forwarding the wheat to the mill as soon as it was delivered on board the cars; that this transaction was in interstate commerce and as to it the statute of Kentucky whose application was invoked by the defendant was invalid because in conflict with the commerce clause of the Constitution of the United States.

The cause was tried twice. On the first trial the plaintiff obtained a verdict and judgment, the court ruling that the statute could not constitutionally be applied to the transaction in question. But the Court of Appeals of the State, while conceding the invalidity of the statute as respects transactions in interstate commerce, held the transaction in question was not in such commerce, declared the statute valid and properly enforceable as to that transaction and reversed the judgment with a direction for a new trial. That court proceeded on the theory that, as the contract was made in Kentucky, related to property then in that State and was to be wholly performed therein, the transaction was strictly intrastate and not within the reach or protection of the commerce clause of the Constitution of the United States;—and this although the wheat was to be delivered on board the cars of a public carrier and the plaintiff intended to ship it to Tennessee as soon as it was so delivered. 175 Ky. 774. On the second trial a verdict for the defendant was directed because the plaintiff had not complied with the statute. The jury conformed to the direction, judgment was entered on the verdict and that judgment was affirmed by the Court of Appeals on the authority of its former decision. 185 Ky. 386.

The case is here on a writ of error and our jurisdiction is challenged. The objection is not that we are without

power to review the judgment, but that it can be reviewed only on a writ of certiorari. The controlling statute is § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. Besides confining our power of review in cases litigated in the state courts to those in which the decision of a federal question is involved, this jurisdictional section provides that the review in cases falling within certain classes may be on writ of error and in others on writ of certiorari, the distinguishing or dividing line being drawn according to the nature of the federal question and the way in which the state court decides it. Some cases may fall on both sides of the line, but with this we are not now concerned. Among those in which the review may be on writ of error the section includes—

“any suit . . . where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity.”

Among those in which the review may be on writ of certiorari are—

“any cause . . . where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity”; and

“any cause . . . where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority.”

In the state court the plaintiff did not simply claim a right or immunity under the Constitution of the United

States, but distinctly insisted that as to the transaction in question the Kentucky statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but applied and enforced the statute. Of course, that was an affirmation of its validity when so applied. *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 144; *McCullough v. Virginia*, 172 U. S. 102, 116-117; *General Oil Co. v. Crain*, 209 U. S. 211, 228; *Corn Products Refining Co. v. Eddy*, 249 U. S. 427, 432. And see *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 3, 27. The case is therefore of the class described in the first of the provisions which we have quoted from the jurisdictional section. That the statute was not claimed to be invalid *in toto* and for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another. *Poindexter v. Greenhow*, 114 U. S. 270, 295; *St. Louis, Iron Mountain & Southern Ry. Co. v. Wynne*, 224 U. S. 354; *Kansas City Southern Ry. Co. v. Anderson*, 233 U. S. 325. Besides, a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage. *Yazoo & Mississippi Valley R. R. Co. v. Jackson Vinegar Co.*, 226 U. S. 217; *Jeffrey Manufacturing Co. v. Blagg*, 235 U. S. 571, 576. Neither does it matter on what ground the court upheld and enforced the statute. The provisions quoted from the jurisdictional section show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution the mode of review depends on the way in which the state court resolves the question. If it be resolved in favor of the validity of the statute the review may be on a writ of error; and if it be resolved against the validity the review can only be on writ of certiorari. The provisions take no account of the particular grounds or reasons on which the decision is put.

It is loosely said in one of the briefs for the plaintiff that the "sole question for decision" is whether the contract was a part of interstate commerce; but we attach no importance to this, because it not only is said in the same brief that the plaintiff "maintained in the state court, and it maintains here, that the Kentucky statute, as construed and applied in this case by the state court, is unconstitutional under the commerce clause," but much of that brief and of another is devoted to an effort to show the invalidity of the statute in that regard.

Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error. Like rulings on like grounds will be found in *Eureka Pipe Line Co. v. Hallanan*, ante, 265, and *United Fuel Gas Co. v. Hallanan*, ante, 277.

The commerce clause of the Constitution, Art. I, § 8, cl. 3, expressly commits to Congress and impliedly withholds from the several States the power to regulate commerce among the latter. Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. Where goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown v. Maryland*, 12 Wheat. 419, 446-447; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 519. On the same principle, where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. *American Express Co. v. Iowa*, 196 U. S. 133, 143. This has been recognized in many deci-

sions construing the commerce clause. Thus it was said in *Welton v. Missouri*, 91 U. S. 275, 280: "Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities." In *Kidd v. Pearson*, 128 U. S. 1, 20, it was tersely said: "Buying and selling and the transportation incidental thereto constitute commerce." In *United States v. E. C. Knight Co.*, 156 U. S. 1, 13, "contracts to buy, sell, or exchange goods to be transported among the several States" were declared "part of interstate trade or commerce." And in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 241, the court referred to the prior decisions as establishing that "interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities." In no case has the court made any distinction between buying and selling or between buying for transportation to another State and transporting for sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last.

A corporation of one State may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. *Crutcher v. Kentucky*, 141 U. S. 47, 57; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 27; *International Textbook Co. v. Pigg*, 217 U. S. 91, 112; *Sioux Remedy Co. v. Cope*, 235 U. S. 197.

There is no controversy about the facts bearing on the character of the transaction in question. It had been the

practice of the plaintiff to go into Kentucky to purchase grain to be transported to and used in its mill in Tennessee. On different occasions it had purchased from the defendant—at one time 13,000 bushels of corn. This contract was made in continuance of that practice, the plaintiff intending to forward the grain to its mill as soon as the delivery was made. In keeping with that purpose the delivery was to be on board the cars of a public carrier. Applying to these facts the principles before stated, we think the transaction was in interstate commerce. The state court, stressing the fact that the contract was made in Kentucky and was to be performed there, put aside the further facts that the delivery was to be on board the cars and that the plaintiff, in continuance of its prior practice, was purchasing the grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing and should have been considered. They showed that what otherwise seemed an intrastate transaction was a part of interstate commerce. See *Swift & Co. v. United States*, 196 U. S. 375, 398; *United States v. Reading Co.*, 226 U. S. 324, 367; *Pennsylvania R. R. Co. v. Clark Brothers Coal Mining Co.*, 238 U. S. 456-468; *Eureka Pipe Line Co. v. Hallanan*, *supra*. The state court also attached some importance to the fact that after the grain was delivered on the cars the plaintiff might have changed its mind and have sold the grain at the place of delivery or have shipped it to another point in Kentucky. No doubt this was possible, but it also was improbable. With equal basis it could be said that a shipment of merchandise billed to a point beyond the State of its origin might be halted by the shipper in the exercise of the right of stoppage *in transitu* before it got out of that State. The essential character of the transaction as otherwise fixed is not changed by a mere possibility of that sort. See *United Fuel Gas Co. v. Hallanan*, *supra*.

For these reasons we are of opinion that the transaction was a part of interstate commerce, in which the plaintiff

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lawfully could engage without any permission from the State of Kentucky, and that the statute in question, which concededly imposed burdensome conditions, was as to that transaction invalid because repugnant to the commerce clause.

Judgment reversed.

MR. JUSTICE BRANDEIS, with whom concurred MR. JUSTICE CLARKE, dissenting.

The writ of error should, in my opinion, be dismissed. The obstacle to our assuming jurisdiction is not procedural; as it is in those cases where a plaintiff fails because the claim was not made seasonably or in appropriate form.¹ Here, the obstacle is the nature of the constitutional question sought to be reviewed. It involves a state statute. But the validity of the statute is not actually drawn in question. Only the propriety of the application or use of the statute is questioned. Since the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726, such questions are not reviewable in this court as of right. They may now be reviewed only in the court's discretion; and exercise of the discretion must be invoked by a petition for a writ of certiorari.

This court has now, as it had before that act, jurisdiction under § 237 of the Judicial Code to review a final judgment of the highest court of a State whenever a right under the Federal Constitution duly claimed has been denied in applying a state statute. And in no case involving a state statute can jurisdiction attach unless the statute has been applied. For unless it was applied, there could not have been an invasion of the party's constitutional right; and unless there was such invasion the con-

¹ See *Jett Bros. Co. v. Carrollton*, 252 U. S. 1, 6; *Mergenthaler Linotype Co. v. Davis*, 251 U. S. 256, 258; *Godchaux Co. v. Estopinal*, 251 U. S. 179.

stitutional question presented, whatever its nature, would be moot. But the Act of 1916 made the nature of the constitutional question raised in applying the statute a matter of importance. If the question is a denial of the power of the legislature to enact the statute as construed, a review may be had as of right. If the question concerns merely the propriety of the particular use of the statute or of the manner of applying or administering it, the review may be had only in this court's discretion. The classification thus introduced rests upon broad considerations of policy. The steady increase of the business of this court had made it necessary to limit the appellate jurisdiction in cases arising under § 237. To this end Congress determined in 1916 that even cases involving constitutional questions should be reviewed here only where the public interest appeared to demand it. Congress left parties a review as of right where the validity of a state statute had been drawn in question; because the decision of such a question is usually a matter of general interest. But whether a valid state statute has in a particular case been so used as to violate a constitutional guaranty is ordinarily a matter of merely private interest. Hence, Congress provided that where the validity of the statute is not assailed, the denial of a claim that in applying it a right, privilege or immunity had been violated, should not be reviewed, unless this court, in its discretion to be exercised upon petition for a writ of certiorari, should direct the review. That is, Congress treated a right, privilege or immunity claimed to have been violated by the courts' erroneously applying a confessedly valid statute to the particular facts of a case, just as it treated a claim that the right, privilege or immunity had been violated by a decision erroneous in some other respect.

In considering whether in this case the validity of the state statute was drawn in question, it is necessary to bear in mind that, in every case involving a statute, the state

court must perform (aside from the consideration of any constitutional questions) two functions essentially different. First the court must construe the statute; that is, determine its meaning and scope. Then it must apply the statute, as so construed, to the facts of the case.¹ In this case the construction of the statute was never in controversy. It had been settled by earlier decisions that the statute referred only to corporations when transacting business in intrastate commerce. Here the only controversy concerned the character of the particular transaction to which defendant sought to have the statute applied. Was it interstate commerce? If so, the transaction was not within the scope of the statute. To decide that controversy two determinations had to be made. One was of fact: whether the wheat was sold and bought for shipment to Tennessee. The other was of law: whether the fact that the wheat was so sold and bought makes the transaction one in interstate commerce. Did that controversy over the character of the commerce draw in question the validity of the statute or did it draw in question merely the propriety, that is, the constitutionality, of its application? What the character of the controversy was must be decided upon the record presented here.

The validity of a statute, as was said in *Baltimore & Potomac R. R. Co. v. Hopkins*, 130 U. S. 210, 224, is drawn in question whenever the power to enact it "as it is by its terms, or is made to read by construction, is fairly open to denial and denied." The power to enact

¹ The word "apply" is used in connection with statutes in two senses. When construing a statute, in describing the class of persons, things or functions which are within its scope; as that the statute does not "apply" to transactions in interstate commerce. When discussing the use made of a statute, in referring to the process by which the statute is made operative; as where the jury is told to "apply" the statute of limitation if they find that the cause of action arose before a given date. In this opinion it is used in the latter sense.

§ 571, Kentucky Statutes, as construed by the highest court of the State, was not fairly open to denial; for the statute was construed as affecting only intrastate transactions of foreign corporations. See *International Textbook Co. v. Pigg*, 217 U. S. 91; *Hooper v. California*, 155 U. S. 648. A writ of error which rested solely upon the challenge of the statute so construed would have presented no substantial claim and must have been dismissed as frivolous. *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, 311; *Sugarman v. United States*, 249 U. S. 182, 184. Compare *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U. S. 436, 441. Nor was the power to enact § 571 as construed actually denied. The question decided below and presented for review here is merely whether this valid statute has been so used—not construed—as to deny to the plaintiff a privilege or immunity guaranteed by the Federal Constitution.

That the character of the commerce—and not the validity of the statute—was the only question actually in controversy and is the only question which the plaintiff actually seeks to present for review, appears from the following statement in its brief filed in this court, as well as from the supporting argument:

"The sole question for decision by this court is whether the contract sued on is a part of interstate commerce or purely a transaction in intrastate commerce. If this court should conclude that the contract is *any part* of interstate commerce, the judgment of the Kentucky Court of Appeals must be reversed; otherwise, it should be affirmed."

A party's conception or characterization of the question presented by the record is, of course, not conclusive of his right to a review. The right is determined by the record. But in this case the record confirms the plaintiff's conception of the question submitted for review. The judgment of the Court of Appeals brought before us is that of October 17, 1919, which affirmed the judgment below en-

tered after the second trial before a jury. In 1917 the Court of Appeals, in delivering its first opinion which directed the second trial, 175 Ky. 774, said:

"This court has heretofore held that section 571, *supra*, does not have any application to a foreign corporation, which is engaged strictly in interstate commerce with citizens of this State. . . . Hence, if the contract sought to be enforced was an interstate commerce transaction, the failure to comply with section 571, *supra*, would not affect the right of appellee to sue and recover upon its contract, but if it was an intrastate business, the failure to have complied with section 571, *supra*, is fatal to appellee's right of recovery. . . . So the question for decision is, was the contract between appellant and appellee one which is protected by article I, chapter 8, paragraph 3, of the Federal Constitution, from regulation by the State of Kentucky, as being a transaction in interstate commerce?"

Since 1903 it had been the settled law of the State, as then declared by its highest court, that § 571 did not affect transactions in interstate commerce. *Commonwealth v. Hogan, McMorro & Tiede Co.*, 74 S. W. 737.¹ Thus, before this action was begun, it was the settled law that such transactions of foreign corporations were not within the scope of the statute. In 1915, after this action was begun but before the first trial, that rule was again applied in *Louisville Trust Co. v. Bayer Co.*, 166 Ky. 744, 746. When, therefore, this case was before the Circuit Court at the second trial and when it was before the Court of Appeals for the second time, there clearly was no actual controversy over the validity of the statute. It

¹ See also *Ryman Steamboat Line Co. v. Commonwealth*, 125 Ky. 253; *Commonwealth v. Chattanooga Implement & Mfg. Co.*, 126 Ky. 636; *Commonwealth v. Eclipse Hay Press Co.*, 104 S. W. 224; *Three States Buggy & Implement Co. v. Commonwealth*, 105 S. W. 971.

is true that plaintiff had used in pleading language which imported not only a claim of immunity because the transaction was interstate commerce but also an assertion that § 571, if construed so as to affect it, was invalid. But a review by this court as of right cannot be acquired by inaccurately describing, or by disguising, the nature of the constitutional claim actually made. Nor could there have been a conscious purpose to do this when the reply was filed. In 1915 the exact nature of the claim under the Constitution was not material. At that time the denial of any claim of constitutional right, whatever its nature, still gave the party a review in this court as of right. It was the Act of September 6, 1916, which made the division of cases involving constitutional questions into two classes a matter of substance.

If jurisdiction upon writ of error can be obtained by the mere claim in words that a state statute is invalid, if so construed as to "apply" to a given state of facts, the right to a review will depend, in large classes of cases, not upon the nature of the constitutional question involved but upon the skill of counsel. The result would be particularly regrettable, because the decision of such cases often depends not upon the determination of important questions of law (which should in the main engage the attention of this court), but upon the appreciation of evidence frequently voluminous. Thus, in proceedings under State Workmen's Compensation Acts or State Employers' Liability Acts, the question whether a carrier is liable depends often upon the question whether at the time of the accident the employee was engaged in interstate or in intrastate commerce. Since the Act of September 6, 1916, certiorari is the proper means of reviewing a judgment involving that question. *Southern Pacific Co. v. Industrial Accident Commission*, 251 U. S. 259. If the rule now insisted upon obtains, the carrier could in every such case secure a review on writ of error by simply claim-

ing that the state statute is invalid under the commerce clause if construed so as to apply to the special facts of the case. Yet it was preëminently the decision of questions like these from which Congress sought to relieve this court by the Act of September 6, 1916.¹ Likewise, in cases involving state taxation the validity of the tax often depends upon the question whether the specific thing taxed was property within or property without the taxing State—a question which, as held in *Dana v. Dana*, 250 U. S. 220, and *Citizens National Bank v. Durr*, ante, 99, can be reviewed here only on writ of certiorari. If the rule now insisted upon should prevail, jurisdiction in such cases could be secured on writ of error by the simple device of claiming that the taxing statute is invalid under the Fourteenth Amendment if construed so as to apply to the specific property involved. So, in suits in state courts against foreign corporations, the question whether there is jurisdiction depends often upon the question whether the corporation was doing business within the State and had expressly or impliedly consented to be sued there.² The correctness of the decision of a state court of this question has been held to be reviewable here only upon certiorari, *Philadelphia & Reading Coal & Iron Co. v. Gilbert*, 245 U. S. 162. But if the rule now insisted upon

¹ See Report of Judiciary Committee, House Doc. No. 794, 64th Cong., 1st sess., House Rep. vol. 3. Of the cases on the docket for the preceding term of this court 37 presented the question whether the employee was engaged in interstate or intrastate commerce. See *New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 168, note 1; *St. Louis, San Francisco & Texas Ry. Co. v. Seale*, 229 U. S. 156; *Philadelphia & Reading Ry. Co. v. Hancock*, 253 U. S. 284; *Philadelphia & Reading Ry. Co. v. Di Donato*, 256 U. S. 327; *Philadelphia & Reading Ry. Co. v. Polk*, 256 U. S. 332.

² See e. g., *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U. S. 264; *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79; *Chipman, Limited, v. Jeffery Co.*, 251 U. S. 373, as illustrating the issues involved.

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should prevail, jurisdiction on writ of error may be secured by simply making the claim that the state statute is invalid under the Fourteenth Amendment if construed so as to apply to the facts of the case.

Plaintiff relies upon a number of cases, assumed to be similar, in which, after the Act of September 6, 1916, jurisdiction was (mainly without discussion) taken on writ of error. They are not in point. In some of them orders of railroad commissions were challenged as violating the Constitution.¹ Such an order, unlike decisions of courts, "being legislative in its nature and made by an instrumentality of the State, is a state law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction." *Lake Erie & Western R. R. Co. v. State Public Utilities Commission*, 249 U. S. 422, 424. In each of these cases, therefore, attacking the validity of the order was drawing in question the validity of a law. In others the validity of state statutes as construed was actually drawn in question.² *McGinis v. California*, 247 U. S. 91, and *McGinis v. Cali-*

¹ *Union Pacific R. R. Co. v. Public Service Commission*, 248 U. S. 67; *Lake Erie & Western R. R. Co. v. State Public Utilities Commission*, 249 U. S. 422; *Chicago & Northwestern Ry. Co. v. Ochs*, 249 U. S. 416; *Pennsylvania R. R. Co. v. Public Service Commission*, 250 U. S. 566, and *St. Louis & San Francisco Ry. Co. v. Public Service Commission*, 254 U. S. 535.

² *Union Tank Line Co. v. Wright*, 249 U. S. 275; *Corn Products Refining Co. v. Eddy*, 249 U. S. 427; *Chalker v. Birmingham & Northwestern Ry. Co.*, 249 U. S. 522; *New Orleans & Northeastern R. R. Co. v. Scarlet*, 249 U. S. 528; *Yazoo & Mississippi Valley R. R. Co. v. Mullins*, 249 U. S. 531; *Kenney v. Supreme Lodge*, 252 U. S. 411; *Royster Guano Co. v. Virginia*, 253 U. S. 412; *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554; and *Merchants' National Bank v. Richmond*, 256 U. S. 635. In *Eureka Pipe Line Co. v. Hallanan*, ante, 265, and *United Fuel Gas Co. v. Hallanan*, ante, 277, it was assumed (in my opinion erroneously) that the situation presented was similar in this respect to that in *Merchants' National Bank v. Richmond*, supra.

*for*nia, 247 U. S. 95, involved, like the case at bar, the determination whether the transaction in question was one in interstate or foreign commerce. Although they did not draw in question the validity of any statute, this court properly entertained the writ of error in each of those cases, because, as the original records disclose, the judgment was of a date so early as not to come within the Act of September 6, 1916. It is true that § 237 of the Judicial Code, which reenacted § 709 of the Revised Statutes, and § 2 of the Act of February 5, 1867, c. 28, 14 Stat. 385, 386, used, in defining the jurisdiction of this court, the phrase "where is drawn in question the validity of a statute." But under none of these acts could there be occasion for deciding the question here under discussion; for each contained also the more comprehensive provision giving jurisdiction where any right, title, privilege or immunity claimed under the Constitution had been denied. And under § 25 of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, 85, which embodied the law prior to 1867, the conditions were substantially the same. Hence little help can be derived from the consideration of cases involving judgments entered before the Act of September 6, 1916, became effective.¹

¹ Thus comprehensive constitutional claims were made the basis of the writ of error in *Coe v. Errol*, 116 U. S. 517, 520, and in *Kelley v. Rhoads*, 188 U. S. 1, 4, which presented the question, whether the property taxed was in interstate commerce and hence exempt from taxation under a general law; and in *Vicksburg, Shreveport & Pacific R. R. Co. v. Dennis*, 116 U. S. 665, 667, which presented the question whether the charter of a railroad granted tax exemption so that a later general tax law if applied to it would impair its contract rights; and in *Delaware, Lackawanna & Western R. R. Co. v. Pennsylvania*, 198 U. S. 341, 352, which presented the question whether the tax appraisal for the purpose of fixing the value of the capital stock could include tangible personal property permanently located outside the State. (See original records.) Compare *Planters' Bank v. Sharp*, 6 How. 301, 307.

Nor can we be aided in construing the Act of September 6, 1916, by considering cases arising under § 238 of the Judicial Code (reënacting § 5 of the Act of March 3, 1891, c. 517, 26 Stat. 826, 827, as amended). For the third clause thereof empowers this court to review by writ of error or appeal decisions of United States District Courts "in any case that involves the construction or application of the Constitution of the United States." This comprehensive provision renders immaterial in this connection the nature of the constitutional question. The specification in the fourth clause, of cases "in which the constitutionality of any law of the United States . . . is drawn in question," and in the fifth clause, of cases "in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States," adds nothing. Nor can we derive aid from cases involving review by this court of cases coming from the Circuit Court of Appeals under § 241 of the Judicial Code (reënacting § 6 of the act, 26 Stat. 826, 828). For under it the right of review where available exists regardless of the nature of the constitutional question.

But cases coming from the District of Columbia and from the Territories in which a review by this court was sought (under the Act of March 3, 1885, c. 355, 23 Stat. 443, and under § 250 of the Judicial Code) on the ground that the validity of an authority or of a statute was drawn in question, are persuasive as to the meaning of the phrase drawing in question the validity of a statute, as used in the Act of 1916. And they were recognized in *Ireland v. Woods*, 246 U. S. 323, 329, as controlling. Thus *United States ex rel. Champion Lumber Co. v. Fisher*, 227 U. S. 445, and *United States ex rel. Foreman v. Meyer*, 227 U. S. 452, hold that the validity of an authority is not drawn in question where the controversy is confined to determining whether the facts upon which a person can

exercise that authority do or do not exist; and the writs of error were dismissed because the validity was not "drawn in question" in the sense in which that phrase is used in the statute, that is, brought forward or made a ground of decision.¹

It is, of course, permissible to make the claim that a statute is invalid and also that as administered or applied it violates a right or immunity under the Constitution. In such a case the writ of error is clearly appropriate. But in the case at bar there never has been a real claim that the statute as construed by the highest court of Kentucky is invalid. The actual claim was and is that a confessedly valid statute was misapplied and, thereby, a constitutional guaranty was violated. A review as of right is not to be obtained by misdescribing the question in controversy. When Congress declared that there should be a review as of right only where the validity of the statute was drawn in question, it did not provide for securing the right by the use of a form of words—a potent formula which should operate as an "Open Sesame." It was dealing with substance. It legislated to relieve an overburdened court.

¹ Compare also *Snow v. United States*, 118 U. S. 346, 353; *Baltimore & Potomac R. R. Co. v. Hopkins*, 130 U. S. 210; *District of Columbia v. Gannon*, 130 U. S. 227, 229; *United States v. Lynch*, 137 U. S. 280; *Ferry v. King County*, 141 U. S. 668; *South Carolina v. Seymour*, 153 U. S. 353; *Linford v. Ellison*, 155 U. S. 503; *Taylor v. Taft*, 203 U. S. 461; where the validity of an authority or of a statute was held not to have been drawn in question; with *Clayton v. Utah Territory*, 132 U. S. 632; *Clough v. Curtis*, 134 U. S. 361, 369; *Steinmetz v. Allen*, 192 U. S. 543; *McLean & Co. v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 47; *Smoot v. Heyl*, 227 U. S. 518, 522; where such was held to have been drawn in question.